REPORT RESUMES

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SEMINAR ON SCHOOL CURRICULA FOR INSTRUCTION IN THE BILL OF RIGHTS.

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TO DETERMINE A COMPREHENSIVE AND CONCEPTUAL STRUCTURE AS A BASIS FOR AN IMPROVED CURRICULUM IN STUDYING THE BILL OF RIGHTS, A SEMINAR OF LEADING SCHOLARS WAS CONVENED. PRIOR TO THE SEMINAR, POSITION PAPERS WERE SUBMITTED BY THE HISTORIANS, LAW PROFESSORS, AND EDUCATORS WHO PARTICIPATED. IN TRYING TO PROVIDE A MORE COMPLETE UNDERSTANDING FOR STUDENTS THE CONCEPTS OF LIBERTY, EQUALITY, AND JUSTICE PARTICIPANTS AGREED THAT PRESENTATION BY CASE STUDY WOULD BE THE MOST EFFECTIVE INSTRUCTIONAL METHOD AND THAT STUDENTS SHOULD BE PRESENTED WITH VITAL AND CONTEMPORARY PROBLEMS CONCERNING THE BILL OF RIGHTS. FURTHER SEMINARS WERE RECOMMENDED TO CONSIDER THE PRODUCTION OF TEXTUAL MATERIALS FOR STUDENTS AND TEACHERS. (PM)

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MINAR ON SCHOOL CURRICULA FOR ISTRUCTION IN THE BILL OF RIGHTS

Cooperative Research Project No. G108 G-018

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with

The National Assembly
on Teaching the Principles of the Bill of Rights
Washington, D. C.

1963

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II. THE PROBLEM AND RELATED RESEARCH

The problem is to impart better understanding of the basic rights guaranteed to all citizens by the Constitution to students and teachers. It is, also, to instill in them a greater personal responsibility and commitment in the preservation of these rights than is now achieved in education. It is, further, to educate students to cope with the issues and to learn a way of dealing with the problems inherent in individual freedom balanced with society's need for order.

Teaching the United Constitution falls within the American History course which is required by law for graduation in four-fifths of the states. (Citations 1 and 22) The Bill of Rights and related Constitutional liberties are usually covered in the 5th, 8th and 11th grades in American History. The 10th, 11th and 12th grade courses in civics, government, and problems of democracy are usually elective and may or may not include units on the Bill of Rights.

There is mounting evidence (Citations 2 - 15) from scholars, polls and opinion surveys that with adolescents, as well as the adult population, a formidable gap exists between the historic principles of the Bill of Rights and what the American teenager and adult actually believe today about individual rights and liberties.

In 1960 the Purdue Opinion Panel surveyed 12,000 high school students regarding their attitudes toward relevant current applications of the Bill of Rights. (Citation 2) The finding revealed that 51 per cent favored substantial abridgement of freedom of the press; 25 per cent felt it would be all right to prevent people from making "troublesome" speeches; 61 per cent believed that laws should be passed against printing or selling any Communist literature; 33 per cent would allow the rights of search without warrant; 58 per cent would deny foreigners on our soil the same basic rights that citizens have; 42 per cent would condone physical and psychological torture via the "third degree"; 33 per cent were unsure about such torture; 5[illegible] per cent would restrict the right to vote, for extremists or for the uneducated.

The confusion in the minds of students concerning the nature and legal basis of civil liberties was demonstrated during the winter of 1964 by a group of 10th and 11th grade boys in a New Jersey high school. (Citation 3) These 99 students, all of whom were enrolled in the school's college preparatory division and 30 of whom were in an "honors" class were asked by their teacher to write a brief definition of "civil rights." Only eleven students mentioned the Constitution as a source of such rights; only one referred to the Bill of Rights and one to "the first ten amendments to the Constitution. Seven mentioned the words "law or laws;" six referred to the Declaration of Independence, either by name or by quoting such phrases as "life, liberty and the pursuit of happiness." Three specified that civil rights were "enumerated" or granted by a government; eleven described them as pertaining to citizens. The majority, however, defined them in vague terms as "our liberties by birth," or "the rights you inherit as a human being," or even, "natural rights are those which a man should be born with as a member of the animal world." Only three made any attempt to identify specific Constitutional rights; those mentioned were: freedom of speech, the press and religion; the right to vote; trial by jury. "Equal opportunity" was mentioned by several, without specific application.

There was a widespread tendency to equate civil rights with "the fight for freedom for the Negro population of the United States." Forty-two students defined the term in this very limited sense. Three of these restricted its application still further, to the use of public facilities! Though all these statements expressed sympathy with the Negro's efforts, the context was generally so vague as to suggest little real understanding of the problem - as, for example,

> "Civil rights is the right of any man, presently the Negro, to hold as much respect in every walk of life as any other man."

Several definitions, like these, were so wide of the mark as to indicate total incomprehension:

> "Civil rights is, if passed in a law, something that would give all men equal rights regardless of race, color or creed;"
>
> "the rights of the American people which are stated in their own religious orders."

One student confessed that

> "Civil rights are hard to define. It all depends on what side you are on. I really don't know what civil rights are because each side has a different meaning of civil rights."

And one young cynic remarked,

> "Civil rights today are more like rights of some people to take the rights of others away."

Efforts have been made to understand the current status of Bill of Rights teaching. (Citation 4) A majority of teachers responding to a national survey indicated that they spend between two to five hours teaching the Bill of Rights in one year, that the approach was largely chronological, the teaching method relied heavily on rote learning, and the testing was largely factual rather than analytical. Further, the majority of teachers evaluated this teaching as adequate for effectively teaching the principles of the Bill of Rights.

It is much easier to describe the problem than to assess its causes. Part of the blame must be laid to the secondary schools and particularly to the social studies curriculum. Where the principles of the Bill of Rights have appeared at all, they have often been confined to rather rigid substantive moulds (i.e., in the traditional history or civics course) which supply neither the motivation nor the medium for transfer of formal principles into vital beliefs. (Citation 5) Students may thus carefully memorize the first ten amendments and recite them unfalteringly without becoming any better able to recognize in real life an infringement of freedom of the press or a denial or procedural due process or a violation of the guarantee of equal protection of the laws. Also, Constitutional principles which are presented without relevance to current social, political and economic problems ill-equip a student to make the essential connection on his own. Another tendency of teachers, at all levels, is to present Constitutional principles as absolute, self-enforcing truths from the museum of our political history. This approach neglects the role of the Bill of Rights as the raw material of a government under the rule of law with this set of principles which must be understood, grappled with, fought for, and constantly reassessed and applied under fire. While there is no question about what the Bill of Rights says, there is always a question of what others, including the courts, say the Bill of Rights means. If students are not prepared to view Constitutional guarantees in that light, they cannot appreciate the vitality and compassionate quality of what Mr. Justice Douglas has aptly termed "a living Bill of Rights."

The prevailing uncertainty of teachers and administrators as to proper location of the Bill of Rights within the social studies curriculum may also have inhibited the development of useful and provocative teaching materials. Although a few texts and other publications have been introduced, the range of available materials is still quite limited. (Citation 6)

There are also some indications that more education of the kind now offered does not narrow the gap between student attitudes and the Bill of Rights. Studies of high school seniors reveal less sensitivity to certain individual liberties than expressed by sophomores in the same school. (Citation 2) Other studies warn that colleges cannot reshape attitudes and inculcate values which have been neglected by the secondary schools. (Citations 9 and 10) It seems fairly certain that education per se is not the answer.

The last two years of high schools, where the Bill of Rights is usually studied, if it is studied at all, may be too late to do any more than treat the symptoms. The junior and senior American history course never reaches the drop-out. It is with respect to this group that the dangers of political apathy and social irresponsibility are the gravest. There is another and quite distinct reason why the subject of Constitutional liberties may now be offered too late as well as too little: it appears from a growing body of evidence that the formation of what can loosely be termed "anti-democratic" attitudes and values begins very early in life, and the process may be substantially complete even at the threshold of high school. (Citation 17, page 642) For example, Hess and Easton have stated: "While it is premature at this stage of our knowledge to consider specific changes in educational practices, it is apparent that the elementary school years rather than the high school years present a crucial time for training in citizenship attitudes and the wider range of behavior we have called political socialization." (Citation 18, page 6)

As an effort is made to determine the route for practical improvement now, study has been required of the way the current situation evolved and of earlier efforts to make education on these values meaningful. The leading forces, to date, have been the recommendations of many national commissions, study groups and projects since the 1900's, on "Citizenship Education."

Teaching about the Bill of Rights traditionally has fallen within the range of values commonly viewed as "citizenship," but it has been only one of many worthy goals promulgated. Their efforts have proved ineffective because they did not face the fact that while the total range of civic behavior is very broad the number of purposes the high school can work on intensively is necessarily limited by time and circumstances. The wise selection of priority purposes was ignored. Franklin Patterson evaluates their weakness and points to the need for leadership in this way:

> "A battery of citizenship goals that comprehends nearly all aspects of social behavior and leaves teachers to infer that all such goals are equally important has serious limitations as a guide to educational practice. Even though priorities among these purposes, according

> to the crucial needs of our society and times, are left unclear, choices inevitably will be made in the day-to-day teaching that goes on in schools. Choices of what should be taught in the case of certain teachers and schools will be very sound indeed. In many other cases, however, choices are likely to be subjective, untutored, or simply expedient until thoughtful leadership is given to the critical selection of purposes that require priority treatment, basing selection both on the nature and needs of high school youth and on the nature and needs of the society that is evolving around us." (Citation 21, page 24)

Another basic fact which has been overlooked, to date, namely, providing for the adequate education of teachers was recently pointed out by the teachers of the Williamstown Workshop. They said, "Teachers cannot teach what they do not know or understand themselves." (Citation 6) They asked for an extensive in-service program to reach the current 70,000 social studies teachers and urged more realistic training for the pre-service teacher specifically for improving the teaching of the Bill of Rights.

Teacher attitudes on civil liberties have been declared weak and their preparation for teaching Constitutional rights has been described as grossly inadequate. (Citations 3 and 5) The three to six unit courses of American history and/or the three to six unit courses of American government that are generally required for the preparation of social studies teachers are not usually aimed to equip a teacher to understand Constitutional law or history or the techniques effective for teaching them. Recent proposals for teacher education and creditation shed no light on the content of courses for educating teachers on the Bill of Rights. (Citation 20) Clearly, the updating of the in-service teacher and the preparation of future teachers has not had the attention of the leading scholars in the related disciplines.

Effectively teaching the principles of the Bill of Rights presents another problem. As they have been incorporated into the citizenship values of the social studies curriculum they are, largely, lost in the shuffle of values competing for the attention and commitment of the student. It is possible to project an experience which may confront many of our students based on a composite of trends within our schools at this time. Seen through their eyes it might be the basis of the social and political apathy, cynicism and ignorance, so often described and lamented.

This experience is based on three major trends in education. First, they see around them a society which mostly cares about their achievement in science and mathematics. (Citation 21) Then, they might sense a great interest in having them understand the "isms" (Citation 22) and, in many cases, only the threat of and defense against Communism. Many schools devote more actual time to these courses than they do to teaching the principles of the Bill of Rights. (Citation 4) Teachers are usually prepared for teaching these courses effectively because a large number of in-service courses are available throughout the country with scholarships provided by independent educational organizations and foundations. Finally, in the sum total of their encounter with the social studies they may fail to receive an experience which helps them to deal with or identify with the values which their instruction has stated as necessary to the maintenance and development of their society. Here the emphasis on facts, events, institutions, processes, documents, can prove hollow if there is no opportunity to "get the feel" of citizenship. In other words, the inability of the society to educate them for that which it says, explicitly, is most important might be conveyed, implicitly, by the total educational experience.

There is no way of assessing how widespread this hypothetical experience may be in reality. It is clear, however, that the view of citizenship education, which prevails at this time, is, largely, a garbled inheritance which would benefit from a fresh and contemporary restatement by the leading scholarship resources of the nation. Further, an effort to state priorities for the interests of education directed toward the competence and responsibility of future citizens and balance them with the other goals of the social studies and all education seems timely. Finally, an active stimulus and leadership force is required if school systems are to incorporate change and improvement in this area.

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III. BACKGROUND OF THE SEMINAR

A. ITS CO-SPONSOR

THE NATIONAL ASSEMBLY ON TEACHING THE PRINCIPLES OF THE BILL OF RIGHTS

The Seminar on School Curricula on the Bill of Rights which is reported below resulted from the cooperation between The National Assembly on Teaching the Principles of the Bill of Rights and the Law School of the University of Colorado.

The National Assembly, a tax-exempt foundation, was created in 1962 through the cooperation in the calling of the initial meeting by the Association of American Law Schools, the American Political Science Association and the National Council for the Social Studies in order to assist educational institutions in improving that education central to the maintenance and development of a free society.

The 97 members of The National Assembly include Justice William O. Douglas and Justice William J. Brennan, Jr., who serve as its honorary co-chairmen and six circuit court judges, the presidents of six universities, the deans of four law schools, the deans of four schools of education, six superintendents of schools and numerous professors of law, history, political science, philosophy, education, sociology, psychology, and allied fields, along with civic leaders.

The statement issued on the creation of The National Assembly said in part: "Education in the principles of the Bill of Rights ... calls for the most searching scrutiny and sustained attention by those charged with the administration of our school system, and both humility and sophistication in the teaching process itself. We believe that the schools are presently falling short of discharging this difficult but basic responsibility ... A free society cannot long endure unless enough of its members are able and willing to speak out in behalf of its principles when they are threatened. If the history of the Third Reich teaches us anything, it is that democracy in Germany fell victim to civic passivity and the silence of those whose schooling and attainments ought to have made leaders of an articulate and determined opposition to the encroachments of tyranny."

The National Assembly program has the goal of establishing a minimum but high standard of education in the Bill of Rights, to equip teachers to teach up to that standard and, also, to have communities support it.

To accomplish this goal, three things must occur. First, curriculum and materials need to be improved. Second, teachers should be adequately trained to teach this new curriculum, using new teaching techniques and the new materials. This training must reach both the current teacher and those preparing to be teachers of this subject matter. Finally, communities require education themselves, in order to want and accept this improved learning about civil liberties for their children.

A new curriculum, emanating from highly reputable scholarship and professional sources would have almost universal appeal and find ready acceptance by local school administrators. A national impact made possible by such acceptance would speed the process of curriculum improvement which is vital to social studies education.

It should be noted that, currently, no other national effort at partial or overall social studies revision has yet coordinated its goals with a realistic program for their attainment. However, The National Assembly program for improving the teaching of the Bill of Rights is viewed by its sponsors as only a part of social studies education. The program is not intended to supplant any current social studies education, nor is it seeking to establish itself as a separate course, subject matter or discipline. The National Assembly point of view is that the first priority within the social studies education on the rights and responsibilities inherent in the principles of our free society and that this should be the best possible education which can be achieved by a free society. Its program will revitalize this important subject which is now required in most schools. As revision of the overall social studies moves along, it is expected that the gains achieved through The National Assembly program will be of assistance and incorporated into this larger program.

The National Assembly seeks to develop the solid theoretical basis for this curriculum through a series of concept development seminars. Attending these are the most advanced scholars from all related disciplines and leading experts who are working to achieve agreement on what should be the substantive base for effective teaching. In this way the scholarship gap with the schools will be narrowed. Schools will be offered a curricula which they can readily implement because it will be above reproach and free of charges of partisanship or narrowness.

When the seminars have completed their work and issue a report, the second stage can be undertaken. This is the development of curriculum based on the concepts and priorities, and the leads to teaching techniques, materials, and organization to which the seminars have pointed. Without this approach curriculum development will proceed in its usual fashion and be too narrowly and parochially determined to be effective. The National Assembly believes that an interdisciplinary approach is required with a strong emphasis on the legal aspects of the subject matter and that this orientation has been largely missing from public education to date. Improvement will result when the nation's leading legal scholars and those from many related disciplines and professions concentrate on the question of what should be our education in the 1960's and 70's toward understanding individual freedom balanced with the need for social order. Certainly no other force in American education is devoted to raising and answering this central question.

There are several possible ways for curriculum development to proceed based on the work of the concept seminars. First, The National Assembly, itself, in association with universities, might initiate curriculum development institutes which would aim to develop specific curriculum for either a course, a grade, a kind of student audience, or a larger curriculum effort which would cover a sequence of grades or a cycle of courses. Another route for curriculum development is the independent activity of a number of universities* which have expressed interest in using the material resulting from the Concept Seminars. The third would be the efforts of individual school systems** to use the Seminar Report for their own curriculum development programs. Once new curriculum is devised, it will follow the established pattern of field testing, revision, retesting and publication.

The seminars are important, also, as the guide for a sound teacher education program*** which is the heart of The National Assembly's effort. Once there is a clear understanding of the concepts one aims to educate young people about and the curriculum that has been devised to do it, the vehicle for doing it is the classroom teacher. A way must be found to update those teachers now in the classroom and mainly, those in preparation, so that they can handle this subject matter in its complexity and provide a realistic training and learning experience for students.

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* The Carnegie Foundation has expressed interest in granting funds to an appropriate scholar to direct a curriculum development project at a university based on the recommendations of these seminars. A number of scholars in contact with The National Assembly are awaiting the final Advanced Seminar Report in order to develop projects.

** The New York City Board of Education has assigned a specialist to explore the curriculum materials for the teaching of civil liberties and civil rights. Their special curriculum council is eager to receive this report as a guide for establishing a pattern for curriculum development. Many school systems in contact with The National Assembly have expressed similar interest.

*** The 1964 conventions of the American Political Science Association and the National Council for the Social Studies, through their association with The National Assembly and their representation at the Boulder Seminar have each scheduled a panel toward the education of teachers for improved Bill of Rights teaching.

A program encouraging communities to review their current teaching and to seek curriculum improvement is also necessary.* It is expected that as communities understanding what the improvement is about, they will initiate cooperation between universities, bar associations, and local individuals from the legal profession to bring about in-service courses for the updating of their teachers. They will also want more adequately trained teachers for their school systems.

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* In California, as an example, through the stimulus of The National Assembly, the State Board of Education in May, 1963 instructed its Department of Education to make detailed studies and prepare course outlines for high schools and teacher training institutions. In October, 1963 the California State Board of Education adopted an official statement which said in part:

> "California public schools are to instruct in the principles of a free government and lead students to a true comprehension of the rights, duties, and dignity of American citizenship ... No student should leave our schools without a lively knowledge of the American Constitution... Our democracy can be kept strong only by the dedication of every new generation to the discipline of liberty ... We believe that teaching in this field, no matter how controversial the issue, should be conducted within the framework of free discussion. Not only the history of the Bill of Rights should be taught, but contemporary issues it raises, such as the debate over separation of church and state embodied in the First Amendment, and the privilege against self incrimination as provided in the Fifth Amendment, should be discussed. Now is the time to help our young people to become aware of the risks, the privileges, and the personal demands of freedom.
>
> We urge all school superintendents to give this subject the highest priority. We hope that the very conduct of the classes studying the Bill of Rights will reflect its spirit and be a demonstration of civil rights in action."

B. OBJECTIVES

The purpose of the Seminar was to provide an opportunity for the leading scholars from many related disciplines, lawyers, judges and organizational leaders who are on the front lines of civil rights and civil liberties issues today to focus on the question of what 'should be' the essence of education on the Bill of Rights in our schools.

The problem as stated in the proposal to the Commissioner of Education for this seminar is: "... to determine by what methods and what curricula teachers and students in high schools and colleges may be given an understanding of the rights guaranteed to all Americans by the United States Constitution and an appreciation of the duties and obligations collateral to such rights and essential to their preservation. The instruction (the proposed activity) will be carried out within the framework of our existing educational system ... Specifically, this seminar will seek to delimit issues and curricular problems within the area of public responsibility herein described."

The specific objectives stated in the proposal were: to formulate basic ideas for high school and college curricula in the defined area. More specifically it is expected that the report of the proceedings of the seminar will contain definitive suggestions:

A. As to when and where in our school system instruction should be given which will best assist our young people in understanding the nature and basis of our rights and freedoms, and of our concomitant responsibilities.

B. As to how and by whom such instruction should be given, including consideration of means and media of instruction, now available or which may be made available.

C. As to a program for the development of the project, answering such questions as: What is the next step to be taken? Under whose aegis? By what persons? At what place and time? At whose expense?

"The purpose is to achieve a workable consensus among the group assembled about a conceptual strucutre for this subject. This will serve as a target which later curriculum research and development projects will aim to make more specific. The further purpose is to seek agreement on what knowledge and understanding constitutes a minimum education in this area and within that minimum to establish priorities for teaching."

This seminar was conceived as the first round of a long term program that will eventually improve curricula in the defined area. Its report will serve as the basis for: 1) Further seminars which will broaden the number of scholars and practitioners who will support this thinking and make further contributions to it; 2) Curriculum research and development at universities and school systems which will aim to apply the conceptual structure and the priorities established at these seminars to teaching units and materials; and 3) Teacher education, both in-service and pre-service, in order to make the teaching of this improved curriculum effective."

IV. THE REPORT

IV. THE REPORT

The twenty-four participants of the Colorado Seminar represent a distinguished group of scholars from many disciplines related to the Bill of Rights and leading practitioners on the front lines of civil liberties issues in society today. The seminar sought to understand what it might contribute or point to for later seminars to consider as improvements in teaching the Bill of Rights which is required in the curriculum of almost every state. This first seminar, mainly exploratory, was a struggle for conceptual and policy agreement among the various individuals, professions and disciplines assembled.

Procedure

Prior to the seminar at Colorado, the participants had an opportunity to study the position papers on the subjects of history, liberty, equality and justice. These were written with "appalling diversity" which presented some difficulty to the seminar and yet may have been fortunate, on reflection. As Professor Pollak stated, "Because we are uncertain how to proceed at this preliminary stage, it will be useful to have these four quite different work samples before us."

This seminar began with an explanation of the ground rules of discussion by the chairman. Instead of proceeding directly into a discussion of the papers, the chairman posed this question to the seminar: "Suppose each of you had a child about to enter his junior year of high school -- what insights, sensitivities or background would you like that son or daughter of yours to have about the American Bill of Rights"? The discussion that followed gave each participant in the seminar an opportunity to discuss the entire scope of the seminar subject, in the light of his own experience and of the papers he had read, but with the focus of discussion on the specific objective of providing a meaningful program of study to young students.

The major themes touched on in the discussion, as later summarized by Chairman Jones, were the following: "First, the importance of seeing the questions of our time from the dimension of history; second, the importance of experiencing democratic life, not being preached to about it, and so of forming a commitment in relation to free political institutions; third, the need for awareness that the Bill of Rights sets forth minimum standards of liberty and that no society is really a good society if it observes only the higher values of compassion and understanding to which civilized people subscribe; fourth, the educational importance of selecting problems for student discussion that will serve best to begin the experience of the student constituency we have in mind; and fifth, the importance of seeing to it that the problems presented to students in Bill of Rights courses be big problems and, at the same time, concrete and close to home."

Discussion on the position paper on Equality came first. Consequently, much posing of general ideas on both teaching content and technique entered at this point. For the purpose of suggesting a consensus position at the close of this discussion, the chairman appointed a committee whose statement with amendments of further definitions was adopted by unanimous vote.

Where possible the chairman sought to develop a consensus on the issues discussed. Some members of the seminar felt that a consensus was unnecessary and that our objective would be achieved through the interchange of views without an attempt to effect the type of compromise frequently required in reaching a consensus. The majority were of the opinion that if a consensus was possible it should be reached in order that we could leave Colorado with an agreement on certain basic matters which would form the springboard for future conferences.

Next came discussion on "A Survey of Leading Theories About the History of Freedom in America." This was followed by the position paper on Liberty, with three commentators appointed in advance by the chairman, opening the discussion. At the conclusion, a drafting committee appointed by the chairman suggested a consensus position on Liberty, which after further discussion and amendment was approved by the seminar.

Three commentators, appointed in advance, opened consideration of the position paper on Justice. The consensus position was resolved by vote during the discussion.

The final sessions were devoted to proposals for carrying this work further through another seminar with additional papers, specific guides to teaching materials and techniques, and approaches to communities and schools for implementing this teaching.

Agreements.

Many agreements were arrived at either by vote on formal resolutions or tacit understanding. First, it was agreed that in discussing improving the teaching of the Bill of Rights, the scope should not be limited to the first ten amendments to the Constitution. Certainly the 13th, 14th and 15th amendments and possibly other provisions of the Constitution such as habeas corpus, ex post facto laws, bills of attainder, etc., which grant or recognize the existence of the rights of individuals in our society should be included within our coverage.

Next, the tripartite schematic structure of "Liberty," "Equality" and "Justice," on the basis of which this seminar was conducted, is recommended as a basis for the organization of later seminars. Changes may be necessary for teaching purposes, but it is necessary and effective for organizing the subject matter at this stage. The concepts of liberty, equality and justice which are the constituent parts of freedom should not be considered in the abstract, but with reference to the principles which find expression in the Constitution and in the court decisions interpreting them. There was agreement that the essential aim of Bill of Rights instruction is to communicate to students insights and sensitivities concerning "the legalities of the matter." This emphasis for teaching was described as "law relatedness," "a presentation that will emphasize the distinctive impress of the legal order," and "presenting the Bill of Rights specifically in the context of achieving and maintaining liberty, equality and justice."

It was agreed that it was particularly important that problems and principles be discussed in the light of history and that cohesion for the entire picture could be gained by appreciating the various theories concerning the history of freedom.

Agreement was also reached on the matter of priority or emphasis within each concept. In Equality, the course emphasis should be on the evolution of formerly disadvantaged groups to the full rights of citizenship. In Liberty, the first priority should be for freedom of expression. In Justice, the emphasis should be on procedural due process as an aspect of justice, with particular stress on procedural justice in criminal proceedings.

The participants agreed that we should teach by the case method on the premise that through an understanding of individual cases we could make the principles clear to the student. Implicit in the use of the case method was an appreciation that real cases would frequently be better than fictional ones and that an understanding of any case required knowledge of the relevant economic, social and political factors which affected it. Further, it was our consensus that Bill of Rights instruction in the schools will not be really accomplished unless students are presented with controversial, vital and contemporary problems.

More than one problem to illustrate each concept was desirable. The number of problems would depend upon the time available for teaching. The sophistication of the problem would depend largely upon the grade level at which it would be introduced into the curriculum and the time available for its discussion. However, certain basic priorities seemed necessary in order to permit an orderly development of the subject. Attention was given to the selection of priorities. Ultimately, selection of priorities will have to be completed with an eye to their comprehensiveness and balance for providing an adequate education.

The National Assembly and later seminars are urged to consider the production of textual materials for broadening the background for both teachers and students. We recognize the necessity in some connections, particularly in the training of teachers, for a comprehensive historic approach to the development of freedom in our society, which does not strictly separate liberty, equality and justice.

Once a full set of concepts is developed, with priorities, this seminar is interested in their application throughout education. The priorities for improving the teaching of the Bill of Rights should be: first, high school and elementary school; next, junior colleges and four-year community colleges; finally, higher education concerned with adult education and four-year colleges and universities.

By unanimous resolution this seminar commends the support given by the United States Office of Education and urges additional support in carrying forward this work through a second seminar. Guidelines for the advanced seminar, the development of papers and materials, participants and organization were also set forth at this seminar. This report is mainly conceived as the guide for effectively concluding the work we started.

Discussion throughout the meeting was unrestricted. Consequently, the individual comments contained in the report sometimes do not appear to be responsive to the preceding speaker. Each person was encouraged to state what he thought on the general issues under consideration and to comment freely concerning any statement made by another participant earlier in the discussion. It became incumbent on the subcommittees, appointed by the chairman, to develop a common consensus from the range of views expressed.

None of the participants approached the seminar with a point of view that it would answer all of the problems in this field and that no further discussion would be necessary. It was appreciated that this was the starting point on a very long road. If agreement as to objective and as to general methodology could be reached, it was hoped that subsequent seminars could develop the precise examples which would best illustrate the concepts, determine where the materials should fit within existing school curriculums, and persuade school officials whose curriculums are already overcrowded of the need to incorporate the materials in their program of instruction.

Many short term and long term questions were raised, informally and formally, which seem to be significant and to require answers. Since our discussions left many of these unresolved, some are included for consideration by those who will pursue this matter.

The materials that follow must be read with the procedure and these basic assumptions in mind. They have been edited carefully, with the object of avoiding repetition and of displaying to the reader the full range of the various views developed. The editors also sought to retain both the original language and the process of idea formation and presentation inherent in each participant's comment. This would seem of value to those participating in subsequent seminars who might find within the raw comments those creative ideas which would spark them into deeper exploration.

It is naturally impossible in a report of this kind to adequately capture the atmosphere of the conference in a seminar of three days. It is fair to say, however, that the participants left not only with an appreciation that their insights into the problem of teaching the Bill of Rights had been broadened immeasurably, but that something useful had been achieved in laying the first bricks of the foundation for the successful teaching of the Bill of Rights. Further, the participants became devoted to this goal as worthy and necessary, and committed to work for its achievement.

1. HISTORY

a. POSITION PAPER

A SURVEY OF LEADING THEORIES ABOUT THE HISTORY OF FREEDOM IN AMERICA

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There is no shortage of American histories on the Library shelves in every size, shape, and focus. We have histories of the whole nation, its regions, Constitutional, political, social, literary, and diplomatic. One can consult histories of Liberalism and Conservatism; of processes such as colonization, industrialization, or urbanization; or read the chronicle of single industries such as fur trading, railroads, armaments or banking. The affairs of specific groups in America -- Germans, Quakers, Negroes, or Jews, for example -- have been carefully traced out, and we have histories of social movements such as abolitionism, the social gospel, studies of major political institutions -- Congress, the Supreme Court, the Presidency, the office of governor, etc. Yet in no single study, nor as a self-contained part of any larger treatment, do we have a satisfactory comprehensive history of freedom as an idea, a process, and a condition in our national experience.

To some observers, any thorough history of the American nation is itself a saga of freedom's unfolding. Whatever the poetic pride of this conception, such histories do not deal concretely enough with the definition, development, and conflicts of freedom to satisfy the criteria of a real history of this concept-in-being.

This vacuum is all the more striking because history is an essential tool for the analysis of what freedom means in America. History defines our indebtedness to the European society this nation broke away from to create new conditions of freedom yet still drew upon heavily for ideas and institutions. History is the calibrating rod that tells whether there is more freedom in any given period in America than before or after. History is the rallying cry of groups claiming ancient privileges and those seeking expanded rights, with both invoking history as a social myth to legitimate legal or political changes in a democratic society. History serves as both sail and anchor for the courts in their interpretation of constitutional guarantees and limitations. In these and countless other ways, any meaningful study of freedom in America must be projected upon an historical base, though once it is so projected, every insight of social science is needed to judge the meaning of events and their contemporary reality. Framing this situation is the fact that the history course in the school curriculum of the United States, for better or for worse, is the most widely taught and likely site for expanding education in the principles of civil liberties and civil rights. For this reason, this paper was assigned the function of using the term "freedom to include the three components of Liberty, Equality, and Justice (being analyzed in separate papers at this Conference)* and to attempt a description of the basic ideas that have, consciously or unconsciously, been our operative assumptions in discussing freedom in American history.

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* To avoid misunderstanding in my use of these terms and since we have not negotiated any common usage in these four papers, I should explain that I use "Liberty" to describe the voluntary holding or expressing of ideas in the political, religious, and social order, and organizational freedom to further those beliefs; "Equality," to encompass the rights of persons to equal treatment by the law regardless of racial or minority status that is essentially held involuntarily, either by skin color, national origin, or a deliberate rejection of a group by the majority society on the grounds of what someone is rather than what he chooses to believe; and "Justice" to describe the entire range of practices provided by private organizations and government to give a person security from duress and "fair" treatment in the investigation, presentation, trial, appeal, and punishment of "offenses" (whatever these may be).

In addition, several other terms of art used throughout this paper should have their special usage indicated. I will talk of the Citizenry to refer to those persons who are able to claim and enjoy equal rights in the society as a matter of

(Continued on page 30)

(Continuation of Footnote, page 29)

regular course, in their local communities and in the nation at large. Clearly, a person might qualify as a Citizen in one part of the country at a given time but not in another, but I use this in the largest and most leading sense of Citizenship generally respected. There are today local communities in which a Jew, a Catholic, or a Chinese-American would be an object of prejudice and overt mistreatment, but these pockets of cultural lag do not undermine the broader social trends.

I will use the term Leading Elites to describe the groups of all kinds, economic, religious, social, political, fraternal, etc., that have always played such a central role in the civic life of American communities and in our politics. I do not mean to equate my term of Leading Elites with Mills' Power Elite or anybody's Ruling Class. As I use the term, the Leading Elites encompass a wide variety of groups who have a legitimate role in debates over civic and political policy. Thus the Committee for A Sane Nuclear Policy and the Socialist Party on the left to the National Review or Americans for Constitutional Action on the right is the spectrum I have in mind ideologically. The term "Establishment" would not do to describe my Leading Elites since that implies a degree of cohesion and common purpose that is wholly lacking, by definition, in the breadth of the Leading Elites in any era.

I will use the term Radical to represent any person or group who chooses to challenge the dominant, fiercely-held dogmas of the day in the economic, political or religious spheres. The term Bohemian will be employed to describe those who choose to challenge the dominant, fiercely-held dogmas of the day that apply in the areas of sex, literature, education, and the arts.

(End of Footnote)

One caveat that must be noted is that any attempt to touch even the highlights of freedom-theories in our history in the space available here, runs squarely up against the special diversities and complexities of American life. The sectionalism and decentralization of political and social life, the heterogeneity of our population, the variety of government jurisdictions, and the position of "private" authority beside "public" justice in our system all have combined to make our freedom-history a diverse, sprawling, uneven, inconsistent, and dynamic process. Just when the historian has sewed together a crucial development that he thinks explains something in time or space, he realizes to his dismay that the sheer multiplicity of American life has torn apart the stitching. This leads most first-rate historians, lawyers, and political scientists to work on detailed monographs about loyalty-oaths, separation of church and state, the fifth amendment, Negro rights, free speech, and the like, while leaving the writing of "grand designs" to the journalists, Toynbeeites, and those with ideological or organizational axes to grind in the name of "history."

Perhaps the assignment of analyzing not just one possible theory of freedom in American history but all those theories relevant to a basic understanding of how we approach this problem is not an assignment that puts stout armour on the critics and sends the theory-maker into the lists with a set of balsa-wood lances. But it does seem this way from the line of sight of the man about to ride out, and I must confess the presence of this foreboding vision even as I start my intellectual gallop forward.

I.

Any history of freedom obviously must rest on a larger theory of history itself, on assumptions about the character of human nature, the relation of human initiatives to larger social forces, of the tension between religion and secular society, of the benign, dangerous, or mixed role of government in human affairs, of the role of law in the social order, and a host of other premises with which the historian orders experience and gives it an interpretive pattern. There is no such thing as "neutral" history, in the sense of power to avoid making these patterning assumptions.

While space does not permit exploring these philosophical underpinnings (or even the causes of the day that these have often been designed to further), I would identify four major theories of freedom in American history. To some extent, these can be seen as overlapping and complementary judgments, with their disagreements arising over the borderline territory that none of them truly commands. I think it is more accurate, however, to regard them as competing historical estimates, especially because quite different sets of personal psychologies, group allegiances, social commitments, and political action typically flow from adopting one or another of these explanations.

A. THE PROGRESSIVE THEORY OF AMERICAN FREEDOMS

The Progressive Theory, simplistically stated, comes very close to Patriotic Myth, and in the mouths of Americanism Committees and loyalty boards, is fiercely insensitive to the realities of American life. Yet in its more careful statements, it is a theory also held by some of the most sophisticated analysts of American society, men who usually project the state of American freedom against the canvas of other societies in 1790, 1880, or 1963, and whose concern is usually with the degree of freedom enjoyed by the Citizenry and the Leading Elites, not necessarily the outermost Radicals of the day or the most challenging Bohemians.

The Progressive Theory sees this nation beginning its national experience with a philosophical and practical commitment to what was, in its day, a very broad definition of Citizenship, extensive freedom of expression, and a solid tradition of Anglo-Saxon due process. Before Independence, the Leading Elites of the colonies conducted their practical affairs with Lockian ideas about liberty and property rights and the "liberties of Englishmen" that led them to fashion new institutions drawn from the legal and political models of British society. With Independence, the heritage of British liberties and frontier natural rights was carried forward into the Virginia Bill of Rights, the Constitution, the federal Bill of Rights, etc. Successive waves of democratic development -- such as the Jacksonian era, the Progressive Decades, and the New Deal -- continued to widen freedom as the seaborad colonies grew into a continental, multi-stocked, industrial power. Today, the Progressive Theory holds, the Citizenry and Leading Elites enjoy a climate of freedom unsurpassed anywhere in the world, and freedom for Radicals and Bohemians is also spacious. The American Indian, the Negro, and oriental immigrants have been steadily accepted in Citizenship, and even when the most outrageous acts were done against the security and safety of the nation -- by the Rosenbergs, the Lucianos, the Chessmans, etc. -- elaborate and full Justice (with all the panoply of counsel, fair trial, and successive appeals) was provided.

Of course, the Progressive Theory adds quickly, before the meringue gets too sweet, all freedoms are claimed within a working society and under a rule of law, and thus some limits on assertions of freedom have been quite properly applied. Libel laws and anti-obscenity statutes for the press are not Cossack measures. Mormons must limit themselves to the favors of one wife, even under a guarantee of full religious liberty. Incitement to race riots; massed, coercive picketing; or organizing a conspiracy to advocate the overthrow of the national government by force need not be permitted under the banner of free speech. Loyalty-security standards for government employees were valid measures to promulgate during World War II, and in the present Cold War.

Those who support the Progressive Theory would also admit in clarification that there have been periodic "lapses" from freedom in our history, such as the federal sedition law used against Jeffersonian editors by the Adams Administration in 1798-1800, or the harassment of dissent by the McCarran-McCarthyites during the late 1940's and 1950's. These are seen as temporary aberrations, however, and the evolutionary enlargement of freedom is presented as the basic and "normal" tradition in the United States. Just what accounts for the initial launching and continued expansion of freedom will divide progressive supporters into various camps. Some would see the precipitating cause as our Judeo-Christian tradition; our system of private property socially controlled and widely distributed; our federal system; the influence of the frontier; "national character": our middle class; our Constitutional framework; and combinations of these and other factors.

B. THE CYCLE THEORY OF AMERICAN FREEDOM

The second, or Cycle Theory of Freedom, sees too many "lapses" throughout our history and in the contemporary era to treat this factor as a minor fly-speck on the roller of progress. Cycle Theory does accept the presence of a good deal of constant freedom in America. It also agrees that there will always be a struggle over the proper limits on freedom, with sporadic vigilantism and official overzealousness. What Cycle Theory tries to explain is why, beyond this, basic liberties are so often denied to Americans when there is no valid explanation in the legitimate needs of public order or control of emergencies?

As its explanation, Cycle Theory sees freedom in American history as alternating between two poles -- periods of relaxation, in which the attention of government and society is focused primarily on personal affairs, party politics, and foreign policy, and periods of repression, when imagined dangers or over-inflated responses to real problems presented by times of war, depression, etc. cause government and society to become angrily preoccupied with punishing a dissident political, social, or religious movement. It would take a book to describe fully the swings between relaxation and repression from 1789 to the present, but some examples of the Cycle Theory would be as follows:

- -- Between 1783 and 1795, there was a decade of peace after the end of the War of Independence, during the writing of the Constitution and Washington's highly praised one-party Administration.

- -- Between 1795 and 1800, severe conflicts arose between the United States and France, almost leading to war. The Adams Administration moved to prosecute the "pro-French Jacobins" but used the Federal Sedition Law passed by Congress in 1798 to jail leading editors and supporters of the Jeffersonian opposition to the Federalists. Sharp restrictions on freedom of speech, press, political opposition occurred.

-- Between 1800-1825 came the "Era of Good Feelings," with the abandonment of the Federal Sedition Act, legitimating of the two-party system, extension of minority religious rights, curtailing of prosecutions for "blasphemy," etc.

-- Between 1825-1855 came the rise of mob violence and vigilantism (plus repressive laws and court orders) against secret societies such as the Masons; against Irish and German immigrants and Catholics in general; against the Mormons; and against the Abolitionists (both in the South and in the North). The national power of the Know-Nothing movement and the street riots and vigilance committees in most cities marked this period as one in which the "Jacksonian populace" became the fist against freedom rights.

The Cycle Chart would thus proceed down through the repressive climate of Civil War, into the period of relaxation of 1866-1877 (outside the South during Reconstruction); depict the high tension over strikes, unions, aliens, and anarchists between 1877-1900; show the relative relaxation during the era of muck-racking and reform between 1900-1914; relate the hysteria during World War I against German-Americans, socialists, and pacifists and its continuation into the early 1920's during the New Deal and even during World War II (with the important exception of the placing of all Japanese-Americans in internment camps); portray the repressive loyalty-security measures adopted between 1946 and 1954, stemming from a frightened over-reaction to the real but limited domestic threat of Communist subversive activities; and conclude with the swing back to relative relaxation between 1955 and the present, with the decline of "McCarthyism" and the repudiation of radical-right wing groups like the John Birch Society in the early 1960's.

Thus the Cycle Theory argues that freedom in America is not a steadily expanding quantity with higher and higher minimums established each decade. Rather, it maintains that as each succeeding generation faces new problems and new groups claim freedom rights in new contexts, our response continues to be a swing between repression and relaxation. And the Cycle Theory also adds that history does not prove that the repression periods are growing less frequent, or shorter in duration, or less intolerant. Rather, the broad survey indicates that it is only the presence of cycles that constitutes a permanent part of the freedom scene in America.

Just why we have cycles and what determines their course are questions that are not as easily answered by Cycle Theory as the presence of the shifts. For some, majority sentiment in America is seen as basically intolerant; therefore, awareness of Radicals and Bohemians brings repression. What insures freedom is the unawareness of dominant opinion in times of calm when the majority is wrapped up in its pursuit of livelihood, family affairs, regular politics, etc. What crisis does is to shock the American majority awake, and lead it to "crack down" on Liberty and Justice rights. Other spokesmen for Cycle Theory would not rest the case on inherent intolerance in the majority but would stress the constant problem of protecting minority rights in a majoritarian system, and would see this as a dilemma of social order that transcended the freedom context and has always marked man's overall political condition.

Cycle Theory, at least in its format to the present period, has little to say about the Equality context for Negroes. Here, the constant legal, political and social discrimination against colored races and the absence of external pressure or stimuli to "explain" either slavery before 1863 or anti-Negro measures after Emancipation poses a dilemma for Cycle Theory that has larvely been left in silence.

C. REGRESSIVE AND REPRESSIVE THEORIES OF AMERICAN FREEDOM

I link two different sets of theories under this one heading because both take a dim view of the overall condition of contemporary American freedoms and of the path by which we have arrived at our present perilous state. Repressive Theory assumes that we have never had real liberty for the dispossessed (the working classes, the tenant farmers, the Negro, the poor), or for those who challenged the basic fundamentals of the system (the Radicals and the Bohemians). Sometimes Repressive Theory is tied to a Marxist-Leninist line that sees the cause of repression in class warfare and capitalism; sometimes the idea is attached to someone's notion of what degrees of freedom there are in other countries, particularly Great Britain or Western Europe generally; sometimes the blame for American restrictions is placed on the business system, populist democracy, mass culture, the industrial-military complex, or other factors. Repressive Theory runs down the checklist of civil liberty in America and produces a completely stained chronicle, especially since there are shifting targets of prejudice, bigotry, intolerance, and ridicule to move to in each generation. Every decade thus produces some group, some movement, or some Radical or Bohemian spokesman who was trampled upon by Authority and/or the Mob.

The companion analysis I call Regressive Theory. This assumes that freedom once flowered and flourished in America, in the great days of the Republic when Jefferson, Paine, Madison, and Henry stalked the land; the small farmer, Renaissance planter, and independent merchant ran the society; and men could speak, write, advocate, and defy as they pleased. At some point (the exact date will vary according to the commentator), this Periclean Age in America came to an end, and freedom has never been the same since. The key technique of Regressive Theory is to lay any modern (or, at least, post Civil War) limit upon Radical or Bohemian freedom against the image of America in the 1790-18XX, era. The rousing quotations from the Founding Fathers about the pursuit of happiness, watering trees of liberty with the blood of tyrants, being eternally vigilant as the price of liberty, swearing eternal hostility to any restraints upon the minds of men, etc., etc. are set against the Palmer Raids and syndicalist prosecutions, the clubbing of union organizers and the suppressing of Radical publications, the censoring of motion pictures and the imprisoning of free teaching in the schools, the McCarthy thrusts and the "gray-flannel-suit" atmospheres of social conformity. "Congress shall make no law," the First Amendment's command will be recited by Regressive Theory advocates, and 20th century readers will be firmly reminded that the Founding Fathers were men who did believe in absolutes and did dare to risk a wholly free society. (Very rarely will Regressive Theory actually describe

the conditions of freedom then, since to describe the loyalty oaths, treatment of Tories, regulation of personal morality, compulsory piety, limits on the press, prosecutions for breach of the peace, and street-mob justice would obviously destroy the golden image of Arcadia.) Regressive Theory has a special framework for the Equality issue, portraying Reconstruction as a time of amicable race relations and progress which was betrayed by various "forces" and is only now being tried again. Regressive Theory does not necessarily rest on a Marxist-Leninist base, or an economic-determinist native brew in the Smith-Parrington-Beard tradition, or even on patrician critique in the Brooks Adams format. It is essentially an elitist view, however, heavy with agrarian-virtue, anti-urban, pacifist, and "intellectual" foundations. It has a strong concentration on the status of the Radicals and Bohemians and less concern with the Citizenry or even the Leading Elites. In this sense, it provides exactly the opposite priorities of the Progressive Theory.

D. THE LIBERAL CONSENSUS THEORY OF AMERICAN FREEDOM

The fourth and final perspective for viewing the history of freedom in the United States is the most all-inclusive and, as a consequence, the most elaborate. It seeks to explain what drives the progress forward, why there are cycles, and whether there is more freedom today than in Jefferson's America. Stated in a capsule, the Consensus Theory assumes that our crises over freedom stem from repeated collisions between an all-pervasive Liberal Consensus in America and the challenges posed to that Consensus by "reform groups," the Radicals and Bohemians, and "unassimilated elements."

According to the Consensus Theory, our intellectual inheritance from John Locke and British institutions, our freedom from the feudal heritage of hostile social classes, and our success in exploiting a rich, virtually empty continent by individual initiative, produced uncommonly broad areas of ideological agreement among the "settler" groups in America about political, economic, and social matters. The following ideas -- centering around a free enterprise system pragmatically regulated by government, mild social reform, distrust of privilege, equality of citizens (Negroes apart, of course), a Protestant moral

code, republican institutions, and two party politics - usually appear on the historian's and political scientist's checklist for the Liberal Consensus. During the 18th century and then in the 19th, the old-stock Americans, predominantly white Protestants from Northern Europe, celebrated this as "the" American system. Immigrants seeking a better way of life or fleeing European tyranny were expected to embrace the Liberal Consensus and join the "melting pot" of freedom, and most were only too eager to do so. Our two major political parties both championed the Liberal Consensus (and competed over who embodied it best), as did civic leaders who called themselves "liberals" and those who preferred to be "conservatives."

Being so firmly united on basic principles, however, the Liberal Consensus did not have a high level of tolerance for those who rejected it or stood outisde its boundaries. Dissenters who advocated "novel" political or economic reforms, whether aristocratic, populist, socialist, fascist, or communist, were not considered "legitimate" movements, nor were those newer immigrant groups in the 19th century, such as Irish, German and Italian Catholics, Eastern European Jews, or Orientals, whose religious principles or racial and cultural mores often collided with the Liberal Consensus of the "old stock" majority. It would take too much space to treat here each major dissenting group that precipitated a freedom conflict at some point in our history, but the list would include religious groups such as the Quakers, Catholics, Jews, Mormons, Christian Scientists, Freethinkers, and Jehovah's Witnesses; social and economic movements such as the Abolitionists, Knights of Labor, Suffragettes, Salvation Army, socialists, anarchists, and pacifists; and political organizations such as the Jacobins, Populists, Coughlinites, American Labor Party, Communists and American Nationalist Party.

Throughout the 18th and 19th centuries in the United States, according to the Consensus Theory, there was substantial freedom for those reformers or mavericks whose views fell within the Liberal boundaries -- Jacksonians and Free Soilers, Republicans and Democrats, different Protestant denominations, etc. Those who stood outside, however, found themselves under social discrimination, restrictive laws, and sometimes even violence in the communities in which they lived. For some of these groups, the presence of open space -- rural areas in the Eastern states and the vast American West -- provided an opportunity to get away from the Liberal Consensus and found their own communities (where, typically, the dissenters would fail to provide freedom rights for those that disagreed with them). Not all dissenters were able to migrate like the Mormons or live apart like the Amish, though, and thus the freedom conflicts described earlier by the Cycle Theory took place.

Consensus Theory would continue its account in a way that is particularly important to the current scene. It assumes that in the 20th century, as the new immigrant groups began to achieve substantial size, material resources, and political importance, and as increasing urbanization and industrialization required new politices in the social and economic sphere, the Liberal Consensus underwent a powerful change in some of its parts. Catholics and Jews won acceptance to the Consensus, partly out of their power and partly because these groups became increasingly "Americanized" themselves. Labor unions and social reform movements won respectability. Today, even the American Socialist Party and Norman Thomas stand within the boundaries of respectability. Thus the Consensus has been enlarged and re-shaped, so that most of the groups listed as Dissenters a few paragraphs ago would now be within the boundaries, give or take a few tensions on specific matters. In addition, attitudes toward sex and censorship have undergone great changes in the past two decades, so that the Liberal Consensus is now much broader on free expression in books, movies, and personal manners. Judicial nationalizing of the standards of due process has increased the Justice minimums that are provided throughout the country. As for the American Negro, he is now beginning to win entry into the Liberal Consensus, though there is obviously going to be a long and stormy passage through the gates.

The final point that Consensus Theory would make is that the widening of the Consensus to take in the new groups has not operated in the area of political dissent as fully as it has in the religious, economic, and moral spheres. Thus, the pressures of the cold war within the United States led to sharp sanctions not only on Communists but also on many left-wing socialists, pacifists, liberals, and even internationalist-minded conservatives. In this sense, Consensus Theory concludes that the United States is still a nation that lacks a true ideology of toleration for dissent. Rather, it has developed a 20th century pattern of defining the all-pervasive Liberal Consensus in a way that takes in more of the population and more free debate than ever before. But it still stops short of accepting the legitimacy of fundamental political dissent, and that is why the cycles will continue to exist.

II.

Having described what seem to me to be the four main approaches to the history of American freedom, what can be said about them by way of judgment and application? The easy temptation is to suggest that we now wrap them all up in one ball of historical wax, describing the progressive, regressive, cyclical, and consensus factors as all "interlocking elements" in the unfolding of American freedom. Thus everyone's biases would be saluted and the accusation of single-factor analysis carefully avoided.

Yet the theories are really not fungible. Merging them would produce a weak synthetic, not a powerful synthesis. For this reason, I would propose a series of questions and propositions with which to test the validity and persuasiveness of each of the four theories or any additional explanation that might be presented. These questions and propositions could each be discussed at length, but space limitations compel me to mention them only in the briefest fashion and give sample problems to be considered under their headings:

1. Are Liberty, Equality, and Justice really harmonious facets of Freedom or isn't there a built-in tension among them, say, between Liberty and Equality, based on the increasing curtailment of Liberty required to enforce Equality standards when these do not arise as ethical norms in the society itself? If this is so, then one test of any historical theory of Freedom is how adequately it portrays the relationship of these parts in the American experience. For example, perhaps Liberty, in the sense of substantial immunity from government compulsion and

private power, was the essence of American Freedom in the first hundred years of the Republic while religious and racial Equality has been the rising issue from 1900 to the present. Still another relationship issue is whether Justice has not always been instrumental rather than elemental; the true problems with denial of due process come when government and society are determined to deprive someone of his Liberty and Equality claims. Justice standards are thus a check on the coercive power of the majority largely through delay and the opportunity to expose prejudice. In short, any general theory of freedom in our history must trace out the way in which American society has conceived of the relationship among Liberty, Equality, and Justice, and how their tensions have been accomodated throughout the changing eras.

2. Is a comparison of the "freedom level" throughout American history a feasible enterprise? Obviously, to be successful, far more precise divisions of the population would have to be made than the Citizenry, Leading Elites, Radicals, and Bohemians I have used here. Variations by rural and metropolitan area, by regional and sectional variation, by the constantly shifting balance between the religious, nationality and socio-political majority and the minority elements in the nation at large and in local communities, and many other factors would have to be taken into account. Standards for measuring the conversion of old rules to changing rules to suddenly imposed new rules in the Freedom areas would have to be established. Somehow, the psychological climate would have to be measured, not only in terms of the sense of deprivation or release felt by the masses or the elites, but also in terms of sociological concepts of class, status, role, and alienation. Clearly, this would be an exercise of art, theory, and history, not public-opinion polling and model-building, and in this sense, it could not hope to be "scientific." But it would be a powerful test of the relative merits of the Progressive, Regressive, and Cyclical Theories, and, as long as a concept of evolution in the human condition was provided to control the mere movement of time, the inquiry would aid greatly in the analysis of Freedom.

3. Considering the substantial work that has been done in interest-group history and theory in the past

decades, would it not be a major test of any historical theory of freedom to see what its conclusions are with respect to the freedom claims of the primary interest-groups of the Realm -- farmers, businessmen, labor, the religions, etc.? Between the poles of altruistic dedication to general freedom and a total disregard of all freedom claims except those that directly advance the group's own concrete interests, where has the center of gravity been in our history? Even a cursory comparison of the relation of groups to the civil liberties and civil rights issues of the 1950's and 1960's suggests that we may have entered a new era in the group context of Freedom issues, and that the time has come to stop quoting De Tocqueville as our political Nostradamus and concentrate on the novelty of the present setting.

4. What about the economic context of Freedom issues in our history? Some historical discussions of freedom make economics the key to cause while others virtually dismiss the economic aspect of Freedom issues and treat these as matters of conscience, bigotry, authoritarianism, nationalism, etc. Yet the easy manner in which, for example, New Deal critics of reactionary judicial or political policies could separate "money matters" and "liberty matters" is not as persuasive today. Government and private organization (corporation and union) controls over licenses, livelihood, and property are still deeply involved in the sense of Freedom for the Citizenry and the Leading Elites. How do we relate the possession and liberal use of private property to Freedom? How should the relation of financial and industrial concentration, alongside middle class minimums of property, be fitted into the specific issues of Equality, Liberty, and Justice?

5. Finally, and this inquiry is put here to show that historical analysis must move into the future as well as prove the past, what has been and will be the effect of the Negro Equality struggle on the Liberty and Justice areas? The Negro movements are stretching the limits of existing constitutional law mightily in matters of peaceful demonstrations, picketing, buyers boycott, defiance of governmental directions (as in withdrawals of children from Northern schools accused

of segregation), complaints against police practices, attacks on blue ribbon juries, and many other situations. Will this mean a widening of Liberty and Justice standards just for the Negro claimants (as some Supreme Court rulings have clearly made exceptions that would cover only civil rights claimants and will never aid the Communist Party or someone seeking to confront an accuser in a loyalty hearing) or will the entire framework of American Freedom be enlarged by the Negro struggle? If the net result in the 1980's of the current Equality struggle is to produce millions of Negro suburbanites, worried about high taxes and garbage disposal and ready to lash out at the political Radicals or artistic Bohemians who challenge an American consensus the Negro now has been allowed to share, then the historic conflict we are now in will have little other than reinforcing effect on anti-Liberty and anti-Justice elements. To discuss this intelligently, comparisons to the development of other minority groups -- Quakers, Jews, Mormons, Catholics, etc. -- must be made and then the overwhelming corrective of the color question must be put in to restrain easy transfers of experience.

These are some of the questions that I think we might address ourselves to in analyzing the history of freedom in America. My list is too short and those factors I have chosen for illustrative purposes are inadequately explored. Even so, many might think this enterprise is impossibly vague and vast, and not worth the effort in comparison to specific work on Liberty, Equality, and Justice topics. Yet I cannot help but think that the time is remarkably auspicious for such an inquiry into the history of American Freedom, and the enrichment of teaching in this area. I base my optimism partly on factors within the American historical fraternity, partly on the objective situation within the nation, and partly on the climate of the school systems themselves.

Give or take a few iconoclasts such as William A. Williams, American historians seem to me (as a political scientist) to be in an unusually reflective, integrative, non-chauvinistic, and multi-casual mood. The bearding of Beard has been done, Daniel Boorstin has found America, Arthur Schlesinger, Jr.'s history has been judged to be entrancing A.D.A. Myth, and the C. Vann Woodwards have offered us compelling peeks at the new syntheses. In this unalienated ethos, histories of freedom or special studies of Liberty, Equality, and Justice issues in our history seem to be gathering on the horizon. The blessing of the Great Foundations has already been given to the enterprise, with the founding at Harvard University of the Center for the Study of the History of Liberty in America, and if the prospectus volume that has emerged from the Center must be called a bland and boring document,* the specialized works promise to be rewarding. The interest of some schools within political science and sociology promise to spur on this development as well. The brilliantly undisciplined work of John P. Roche is one example of this trend.**

Partly, the time seems ripe for historical re-examination of American Freedom because of objective factors in the nation and the world -- the civil rights struggle and the need to re-write the "White Boy's Guide to the American Past" which serves as the text in so many of our schools and general histories; the widespread public desire to have students learn the differences between the Communist systems and the American system, with civil liberties being one of the crucial comparisons; and the increasing diminution or even disappearance of serious tensions among nationality and religious groups that traditionally made silence the safest course when facing problems of the history of civil liberties issues involving these matters.

Finally, I think the cult of "compulsory patriotism" does not hold sway in the 1960's in the nation's school systems, despite pockets of such sentiment in particular states and the bubbling up of Birch juices in many local communities. This means that the climate of the schools themselves is auspicious for a program to enrich civil rights and liberties education.

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* Oscar and Mary Handlin, The Dimensions of Liberty, (Cambridge, Mass.: Harvard University Press, 1961).

** Roche, "American Liberty: An Examination of the 'Tradition' of Freedom," in Aspects of Liberty (Edited by Konvitz and Rossiter), (Ithaca: Cornell University Press, 1958) 129-162; see also Roche's "The Curbing of the Militant Majority," The Reporter, July 18, 1963, 34-38.

Thus, I suggest that history provides one of the best and most available tools for accomplishing a national-scale effort to present the heritage and contemporary problems of American Freedom in more effective fashion in our schools, our colleges, and in the communities. Perhaps what we are engaged in is manipulative, but so has always been the history of men's efforts to enlarge the conditions of freedom, for those who would by ignorance or design curtail essential freedoms do not surrender their positions on request. And while history may not itself be the march of freedom, as Croce argued, it is a superb guide to where we have been and where we are free to go, if we know the way.

b. AUTHOR'S INTENT

Professor Westin

This paper was developed for this audience. I do not think the average high school teacher would profit much from it unless I spelled out in much greater detail who was advancing the progressive theory of history, what kinds of ways it was being used, and so forth. All four papers might lead this seminar to recommend the further development of three different levels of papers. The first would be addressed to the professional scholars in the field. It would present where we stood in our understanding of these basic concepts of history, liberty, equality and justice, what kind of new research or new approaches, or new ideas and formulations could be discussed intramurally among people who had concentrated on this as one of their main specialties.

Next, this seminar might say we need a second paper addressed to high school teachers of history, social studies, and the college people. There is a growing trend to have a course in civil liberties in the college curriculum. It used to be the second semester of the undergraduate course on the Supreme Court or the Constitution. In the first semester one was forced to teach the commerce clause and to talk about judicial biography. In the second semester one was released from constraint and had all the fun of talking about freedom of speech and press and equal protection and so on. I take it this is changing a bit and there tends to be a course which is called Constitutional liberty or civil liberties which is now beginning to be part of the undergraduate curriculum. It is sometimes taught in the political science department, sometimes in the history department. We ought to think of guiding the man who teaches this as much as high school teachers. The paper has to be longer and set out certain themes as the teachers of the Williamstown Workshop did on the thread of liberty idea so that fellow teachers would profit from it.

Third, a paper should be directed to the consumer, the student, on a different level of sophistication and example and sensitive to grade, course, etc.

In the future, I would like to do another paper about the history of liberty for the student. I would take one clause of the Constitution that had a derivation in English Constitutional history and a formative debate in the American colonial experience and show the elements of choice the Founding Fathers had when they framed it as they did. What was rejected? What was accepted? Then, I would like to try and show how, at three or four test points in our history, in 1798, in 1850, 1900, 1960, a single problem, that of an outrageous speech that was published in a newspaper or the question of the ability to serve on a jury, was dealt with in the understanding of the concept of freedom of press or in the concept of equal protection. This would show the student that in each of these periods we have changed our notion of what that clause meant. This would relate back to the first paper to the sophisticates and the second to the teachers.

c. HISTORY DISCUSSION HIGH POINTS

Judge Hastie

Professor Westin's point is that any meaningful study of freedom in America must be projected upon an historical basis. I think that is a satisfactory premise. We should accept or reject the definitions, using freedom as a comprehensive term including liberty and equality and justice, so that we can be talking a common language. If we accept the definitions, then we do not have the problem of whether freedom of religion belongs with liberty or equality. This definitional scheme as well as the use of an historic method of organization are appealing and worthwhile in the study that we are undertaking. I personally have the feeling that what is set out as the liberal consensus theory of American freedom has very great possibility as a framework for organization in relation to each of the components of freedom. Those who feel that the Bill of Rights itself has a dynamic quality, a quality of growth and development and taking on meaning appropriate to the time, will find that in reference to the Bill of Rights itself such a theory of evolving freedom is meaningful and very helpful in the planning of teaching of the Bill of Rights itself.

Mr. Craig

I agree with Professor Westin that history is an essential tool for the analysis of what freedom means in America. I suspect that a history course is the most likely site for expanding education in the principles of civil liberties and civil rights. Even when defined, I cannot agree with treating the history of freedom in America in the four categories that were suggested, thought-provoking as they were.

"Government" and "Freedom" are not completely compatible terms but certainly the former is necessary to protect the latter, even though at the same time it restrains the latter. The history of mankind in the quest for freedom is necessary to an understanding of any nation and its institutions. Some knowledge of Russian history is extremely helpful in disclosing that "Communist practices" of Lenin, Stalin and Khrushchev are not "Communist practices" at all but simply pure straight Russian out of centuries past. The history of liberty and freedom in America is not from 1789 to the present; it started long before that, and I think an understanding of this in teaching the Bill of Rights and the Constitution is necessary.

Judge Weigel

In Professor Westin's indication of tension among liberty, equality, and justice, I would like to comment that it depends on what you look at. Today, more than ever before, immunity from government compulsion and private power is central.

It seems to me Professor Westin has done us a service in including in a single term, the term freedom, the concepts of justice, equality and liberty. This overall description, freedom, is the object of the Bill of Rights. For the purpose of discussion, liberty must be fragmented, for example, in order to reach the viscera of freedom. There is a real danger in minimizing at any given point in history all of the facets that enter into the components of freedom.

Professor Cross

Professor Westin's approach would be valuable for material directed toward the teachers of American history in high schools. This kind of historiographical sophistication which these categories fit would be a very important tool in requiring the teacher to be considerably more self-conscious about the ways in which he approaches history. The advanced placement program in American history regards the lack of sophistication on the general assumptions with which teachers approach a topic as the major area of weakness in teaching American history in high schools.

Professor Simon

History has enormous importance in presenting Constitutionalism, principally from two points of view. First, the fragility of the whole process of the Bill of Rights is pointed out and this precarious quality leads to growth. The Raleigh trial is a good example of this fragility. It was attended with procedural barbarity that was almost unparalleled in English treason trials. The man who was principally responsible for this barbarity was Sir Edward Coke, and he was later responsible for the popularization of the Magna Carta which he achieved by twisting its meaning.

Professor Starr

The value of Professor Westin's paper is that it offers a very interesting way for the teacher to conclude a discussion on the Bill of Rights. The patternization of history is an important consideration even on the high school level. In discussing the Bill of Rights in the classroom through liberty, justice and equality, we can ask, 'Is there any pattern that emerges from the history of these documents as treated by the courts or as they are regarded or disregarded by society'? Both the high school teacher and the better-than-average student ought to know that many answers have been advanced, and they ought to know what these answers have been. Professor Westin should supply the literature which delineates these different approaches so that teachers and students can read and discuss these. Without this the teacher can merely say, 'Here are four different interpretations.' They are therefore imposed and not arrived at through a basic understanding.

Professor Rogow

I have a reservation about the categories that are said to be theories. I think there is a fifth theory, the Hobbesian-Freudian theory of history or liberty which is, namely, that liberty is a marginal concern of American society and therefore always very precariously located. This is not regressive theory I mean liberty is something which many Americans find it difficult to live with, regardless of class, etc. The argument goes that liberty is difficult under any system, capitalistic, communist, facist, or whatever. There is an inherent insecurity involved in being free and having liberty which people find burdensome and therefore escape to authority. They escape from freedom; they escape from liberty. Freud thought most people could not tolerate the restraint of civilization and that this was inherent in human nature. As I understand Freud, only a minority could live with culture, with civilization, and in some sense with liberty. Only a minority would utilize it and it would follow from this that only a minority would rise to defend it when it was under attack. I think this is the most important theory.

One point to be made from this is that far from assuming, as we all do here, that liberty is a desideratum of American society, there might be some payoff in making the contrary assumption, that it is not. Then, the question is not how to defend the Bill of Rights, not how to teach students to understand what it is, but how to get involved with it. How to turn a minority interest, if it is one, into a majority one. Maybe, in fact, most people do not care anywhere, in Russia, in America, in a worldwide sense. Maybe we need to look into the economic, the social, the psychological and the cultural conditions which would promote a freedom-loving people and a freedom-loving world community.

Dean Pye

Our objective here, it seems to me, is ultimately to arrive at a program of study which will permit a student in a secondary school to understand the basic rights guaranteed to him by the Constitution in the context of the social problems of our time. As a result of this understanding, we hope to change attitudes or form them and perhaps even to affect behavior. In some students at least we may obtain a commitment to the preservation of these rights. I am concerned that Professor Westin's thesis, as an approach, may be a detour and lead us a little astray. We have already taken fairly specific Constitutional guarantees and lumped them into sometimes overlapping concepts of liberty, equality and justice. This paper then takes these three concepts and comes up with a fourth which is called freedom. This is a forced definition. I tend to think of freedom as being something very close to liberty in the sense that Professor Hurst expressed it in his paper. I rarely think of it as embracing procedural due process in civil and criminal cases in the sense that we have it contained in Professor Jones' paper. Our interest should be the history of the development of this concept, rather than the various theories of this history. My basic problem is I am not sure how a total understanding of each of these theories assists us in teaching someone what the meaning of specific provisions of the Bill of Rights is and how to relate this to the contemporary problems which he is going to have to face. This paper talks about the historical method and uses civil liberties as an example. Our thesis is that we are teaching the Bill of Rights and that we are understanding the Bill of Rights by looking at its history. We are concerned with not only the problem of government encroachment or the problem of restriction on the individual liberties that inevitably results when a large pressure group enforces its will upon somebody, but we are faced with this problem of first what is liberty, or, putting it in this language, freedom. People are now claiming to have freedoms which come in conflict with other freedoms. I am not sure whether you are a cyclist or a repressive or whether you are a progressive or a liberal consensus man helps much in solving it. The virtue is we have a Bill of Rights which can form a basing point, and we have problems. Our job should be to try to use history to explain the meaning of the problems, but not to start off teaching history and using either freedom or any other single thing as the example of it.

Professor Emerson

One thing that needs explanation is the fact that in most of these areas what we are talking about is the development of Constitutional law which has taken place since 1920. This is related to the whole growth of industrialization, urbanization and an increase of a sort of impersonal bureaucratic due process idea. Analysis of the legal development in the light of these other factors would be important to add.

Professor Dorsey

Perhaps the methodology of law might contribute to the teaching of history. Liberty, equality and justice in their specifics either grow or decline, are preserved or almost shattered, depending on whether or not key persons make a responsible choice in key situations to act in accordance with professed normitive or moral principles. One problem in current history teaching is that history is often presented as though there was no choice involved. We are concerned in teaching students the need for choice, the responsibility of choice, and trying to instill in them commitment to principle and a sense of responsibility. Here we have situations where you can identify who makes the key decisions and what those decisions are and what effect they will have on the course of equality, justice and liberty in the United States. But, rather than abstracting into the categories of liberty, equality, and justice, you do as the law does and take these things where they come to issue, with a principle that is asserted, with interests that conflict and require different interpretations of that principle, or argue whether or not the principle should be applied, or what the principle should be. I would suggest breaking these down in terms of functional categories of rights and then within the conflicts that arise, what causes these clashes of interest and create the debate about the application of these.

DORSEY'S SUGGESTIONS* OF CONTENT BREAKDOWN FOR TEACHING THE BILL OF RIGHTS TO STUDENTS AND SECONDARY TEACHERS

1. The right to security of person, papers and lodging.
    - A. The right against illegal search and seizure and the public interest in effective prevention of organized crime.
    - B. The right not to be a witness against oneself and the public interest in preventing subversive activities.

2. The right to participate in decisions affecting the civil order.
    - A. The right to vote and demands for preservation of social and economic privilege.
    - B. The right to form private associations and the public interest in preventing exclusion on discriminatory bases. (political parties)

3. The right to know and communicate.
    - A. The right to espouse political causes and the public interest in the protection of order and security.
    - B. The right not to speak and the duty to disclose information about illegal activities.
    - C. The right of artistic expression and the public interest in preventing obscenity. (censorship)
    - D. The right to have equal opportunity to know and the demand for preservation of privilege.

4. The right to own property and contract.
    - A. The right not to sell property and the public interest in equality of opportunity to own property.
    - B. The right to select customers and the public interest in equality of right to be served.
    - C. The right to manage one's business and the public interest in workable competition.
    - D. The right to manage one's business and labor's interest in distribution of profits, working conditions, and the rate of automation.
    - E. The right to manage one's business and the public interest in development of new products.

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* By unanimous motion commended for consideration of the Advanced Seminar.

F. The right to select business associates and the public interest against exclusion from job opportunities on a discriminatory basis - apprentice practices.

5. The right to freedom of religion.
   - A. Separation of church and state and the public interest in aid to education.
   - B. Religious education and required conformities.
   - C. The conflict between freedom _of_ religion and freedom _from_ religion.

Professor O'Neil Further suggestions of rights in conflict are: free press and fair trial and equality property conflicts.

Professor McCloskey I agree with Professor Westin's formulation if it is understood as not proposing an unchanneled discussion of equality or justice or liberty in America, but as focusing in the first instance on the legalities so that they can be the entry point at each historical moment. Ramification into questions of philosophy, sociology, and historiography would follow.

I take it that Professor Westin's interpretation of the history of freedom is not incompatible with this and is indeed designed to fit into it very well. I would think that the student first learns about the history of these various categories of freedom through this approach which begins with the legalities of the matter. Then you are in a position to go on from there with a student, if you have the time, and the kind of students who can go on with you and talk about these questions of interpretation and historiography that Professor Westin raises in his paper, whether it is one of the four formulations that he offers there, or Professor Rogow's fifth, or any other.

2

Professor Rainey

The legal approach as the starting point is in direct conflict with very important principles of teaching. A good teacher will not start with the Bill of Rights. He starts with the pupils' interest and builds from that outward. The concepts and legal approach we are discussing will come at the end.

Dean King

I think that if the starting point is too legalistic, it will be a dead thing, and will not excite the interest of the teachers or the students.

Professor Dorsey

What is more alive than a disputed principle? Real people with real interests arguing over the application of principle offers teachers no difficulty in presentation.

Professor Hurst

The very point of our whole enterprise is to teach students the distinctive impress of the legal order. Right at the outset, you must pick a factual situation which is close to their experience because it leads directly into the use of law and to the force of the law.

2. EQUALITY

PRIORITY # 1 CITIZENSHIP

THE EVOLUTION OF THE FORMERLY DISADVANTAGED GROUP TO THE FULL RIGHTS OF CITIZENSHIP

a. POSITION PAPER ON EQUALITY

by Louis Pollak
Professor of Law
Yale University Law School

The ensuing pages reflect an attempt to give maximum focus, or at least a fairly specific point of departure, to that phase of the Conference discussion which will center on Equality.

The more I thought about the shape of our probable discussions, the less useful seemed an attempt to prepare an essay discussing the concept of Equality at large, and/or to catalogue its myriad manifestations. So I finally decided to single out a principal example of the role of Equality in the development of our public legal history. My hope was to try to capsulize the growth of the major concept, in terms of the chosen example: my perhaps presumptuous purpose was to see if we, at this Conference, could reach substantial agreement on a preliminary blueprint from which curriculum designers and textbook writers could work. As is obvious, and as the ensuing pages confirm, an attempt to capsulize any major historical-legal development in so brief a space necessarily reduces the central problems to a rudimentary, highly over-simplified form of statement. Nevertheless, I have thought the effort worth making, if only on the theory that many failures to reduce the problems to their lowest common denominator are the necessary predicate to their ultimately successful restatement.

Not too surprisingly, the aspect of Equality I selected was the one which has been a central threat throughout our national history -- what Myrdal called "The American Dilemma": the place of the Negro in American democracy. There are, of course, many other crucial aspects of the concept of Equality which must be unraveled, and restated down, as it were, prior to the working out of syntheses which student and teacher can usefully cope with at the primary and secondary school levels, as well as at college. Some of these I shall itemize here, as a sort of checklist for further reference at our Conference.

1. The ever-widening of the right to vote. This should include a study of the growth of political parties, and of the structure of our legislative institutions (including the history of malapportionment) and our executive institutions.

2. Economic opportunity. Such a study should include the liberty to be let alone in pursuing one's business enterprises (economic due process, and the commerce clause); the liberty to seek protection against the encroachments of others (antitrust laws, the legitimization of unions and of modern welfare legislation, etc.); and the relation of the structure of our legislative institutions to the protection of the interests of different claimants seeking preference (herein of the Tenth Federalist).

3. Equal justice under law: starting with jury trial and habeas corpus, and showing the movement toward the Supreme Court's current insistence on the positive obligation of government to assure the ingredients of fair procedure (right to counsel, etc.). This study should include reference to the growth of administrative procedures.

4. The rights of women.

5. The role of the alien seeking entry into, residing in, and acquiring and attempting to enjoy full citizenship in the United States (herein, also, of the World War II Japanese Relocation Cases).

6. The ban on governmental establishment of religion.

7. The prohibition on titles of nobility and comparable emblems of class distinction.

Negro Membership in the American Community

I.

One hundred years ago, at Gettysburg, Lincoln said that the United States was "conceived in liberty and dedicated to the proposition that all men are created equal." And, in Lincoln's view, the problem which the Civil War posed was whether "any nation so conceived and so dedicated can long endure."

In harking back to the nation's origins Lincoln was, of course, reminding his fellow countrymen of what Jefferson had written into the Declaration of Independence. But Lincoln did not quote the Declaration; he only paraphrased it. And the Declaration had mentioned liberty and equality in reverse order:

> We hold these truths to be self-evident, that all men are created equal, that they are

> endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed.

The words of the Declaration seem to suggest that equality and liberty are different sorts of concepts: that equality is the antecedent status all men enjoy before governments come into being; and that liberty -- and the cognate "unalienable rights" -- flow from that status and require the establishment of governments for their nurture and protection. The Declaration, in short, postulated an important relationship between equality and liberty. Moreover, the Declaration gave the idea of liberty some content, at least in the negative sense that it recited at length a number of the "repeated injuries and usurpations" which the hapless George III was charged with having inflicted on a free people. The Declaration was, however, pretty much silent as to what equality is, and as to the role American political institutions should play in giving the concept some operational meaning.

The ambiguity was more than verbal. Consider the discrepant understandings of equality of Virginia and Massachusetts, the two states which gave chief political and philosophic leadership to the new nation:

The Virginia bill of rights, which George Mason drafted in June of 1776, was one of the documents on which Jefferson principally relied, in the ensuing weeks, in writing the Declaration. Mason's words -- "all men are by nature equally free and independent. . ." -- became part of the Virginia Constitution. Under that banner -- and notwithstanding the very real qualms of Jefferson, Madison, and Washington -- Virginia, in the closing decades of the eighteenth century, housed a third of America's slaves.

In 1780, at the instance of John Adams, Massachusetts adopted a constitution whose declaration of rights stipulated that, "All men are born free and equal. . ." Three years later, in the *Quock Walker Case*, the Massachusetts Supreme Judicial Court held that "our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal -- and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property -- and in short is totally repugnant to the idea of being born slaves."

Thus, at the founding of the nation, many white Americans felt that the idea of slavery was "totally repugnant" to the idea of equality. But many others felt the two ideas were wholly compatible. And, it may be surmised, a substantial majority of white Americans, if troubled by a seeming incongruity, nevertheless felt that the two ideas could be permitted to coexist.

Such, at least, was the apparent verdict of the United States Constitution, adopted by the several states and put into effect half a dozen years after Quock Walker. The Constitution, in language reminiscent of the Declaration, avowed a purpose "to secure the blessings of liberty to ourselves and our posterity"; and, two years later, allegiance to "life, liberty, and property" was specified in the Fifth Amendment. Equality appears in the Constitution as a description of the permanent parity of representation of the states in the Senate. Indeed, in this form, equality was given a sacrosanct position: the structure of the Senate remains to this day the one feature of our governmental arrangements which cannot be amended away. But human equality is not mentioned anywhere in the text of the Constitution or in the first twelve amendments. On the other hand, the Constitution acknowledged the existence of slavery (although not in haec verba) in those states which chose to maintain it: A slave was reckoned as three-fifths of a free man, for the purpose of calculating "direct" federal taxes and representation in the House of Representatives. Runaway slaves, like runaway felons, were to be returned to their state of origin. And the foreign slave-trade was to proceed without federal hindrance until the year 1808.

The Fifty-fourth Federalist explains the Constitution's view of the slave, but tempers the explanation -- whose reasoning it acknowledges to be "a little strained in some points" -- by attributing it to "one of our Southern brethren":

> . . . But we must deny the fact, that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property. In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another,--the slave may appear to be degraded from the human rank, and classed with

> those irrational animals which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others, -- the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property. The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character. . .

Whether or not this explanation satisfies the mind, it substantially describes the recognition of slavery's legality which the northern states felt compelled to make as the price of achieving a viable Constitution embracing all the states.

Many, perhaps most, of the framers of the Constitution expected and/or hoped that in any event slavery was a dying institution. They thought economics would resolve, in favor of free labor, a dilemma of conscience versus moneyed interest too huge for the fragile politics of 1789 to cope with. A political solution which was not a solution -- which simply dropped the dilemma in the lap of the larger forces which were thought to govern man's business dealings -- quite understandably carried the day. What the framers could not foresee was that, by the time the foreign slave-trade ended, the Yankee ingenuity of Eli Whitney would make the working of slaves (and Virginia's specialized industry of slave-breeding) profitable beyond the eighteenth century's wildest dreams.

And so, in the first half of the nineteenth century, the dilemma became not less, but more, acute. Northern hostility to slavery, and northern reluctance to cooperate in the return of fugitive slaves, was regarded by the South as subversive of the federal compromise, embodied in the Constitution, under which basic social choices were thought to be matters of state, not national, option. And, under the pressure of rising Abolitionist sentiment, Southern proponents of slavery moved from the Constitution to the higher ground of conscience: the master-slave relationship was discovered to be a Christian, mutually ennobling, relationship.

The great political battles of the period -- those surrounding the Missouri Compromise, the Mexican War, the Compromise of 1850, and the Kansas-Nebraska Act -- centered on the extension of slavery into the new western territories. But in 1857 the fragile, jerry-built mechanism of political accommodation, by which slavery was permitted in some territories and barred in others, was smashed beyond repair: The Supreme Court, in the Dred Scott Case, held that Congress was powerless to bar slavery in any of the federal territories. And in the same judicial breath the Court held that not even a free Negro could ever aspire to the constitutional status of "citizen of the United States."

The Fifty-fourth Federalist has argued, albeit without much conviction, that the "Constitution . . . decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property." But Dred Scott candidly dissipated that constitutional mirage. To be sure, a slave was property: "the right of property in a slave was distinctly and expressly affirmed in the Constitution." And, "An Act of Congress which deprives a person . . . of his property merely because he . . . brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." But, just as surely, no Negro, whether slave or free, could be regarded as a person entitled to participate in the national political community foreshadowed by the Declaration and realized by the Constitution. Our pre-Revolution history and the plain intendment of the Declaration and the Constitution, so the Court felt in Dred Scott, put all Negroes beyond the pale:

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.
>
> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. . .

> They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or suppose to be open to dispute. . .
>
> The language of the Declaration of Independence is equally conclusive. . .
>
> This state of public opinion had undergone no change when the Constitution was adopted. . .

Judged as an interpretation of what Jefferson meant, when he wrote in 1776 that "all men are created equal," *Dred Scott* is only partially persuasive. Certainly the Massachusetts court had not been patently absurd when, in *Quock Walker*, it found slavery repugnant to the comparable language in the Massachusetts Constitution. Nevertheless *Dred Scott* was on unimpeachable historical ground *in reading* the federal Constitution as a document which designedly countenanced the perpetuation of slavery in those states which, unlike Massachusetts, elected to maintain the "peculiar institution." What *Dred Scott* added were the twin propositions that Congress could not curtail slavery in the federal territories and that the states could not confer on free Negroes participation in the civil and political life of the nation. Lurking behind these propositions was the ominous, unanswered question whether the Constitution really did guarantee Massachusetts and the other free states the power to enforce their anti-slave option within their own borders, or whether the slave-owner had as full a right to bring his slave property into a free state as into a federal territory. This question was, perhaps, only nominally a legal one. More realistically it was a question about the dynamics of the institution of slavery itself, now that the Supreme Court had denied to Congress the power to keep slavery within its accustomed territorial bounds. Lincoln, a lawyer but first and foremost a very practical man, did not, in 1858, "expect the Union to be dissolved." He did not "expect the house to fall." But he did "expect it will cease to be divided. It will become all one thing, or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction, or its advocates will push it forward till it shall become lawful in all the States, old as well as new, North as well as South."

Prior to Dred Scott Congress had been able, one way or another, to hold the divided house together. But Dred Scott withdrew the chief issues from federal legislative competence. Yet neither the Court nor the President could fill the governmental void. Thus the Court had at a stroke made the national government too feeble to cope with the nation's great dilemma. All at once the United States was as impotent, in the face of the problems confronting it, as it had been under the Articles of Confederation. In 1787 the states' community of interest was large enough so that new and viable political institutions could be constructed. But this time, the centrifugal forces were too great. And so, as Lincoln put it, "the war came."

"All knew," said Lincoln, "that this /slave/ interest was somehow the cause of the war." The tension had at last become insupportable: The tension between equality as it was understood in Massachusetts and equality as it was understood in Virginia. The tension between the liberty of a man to be free and the liberty of a man to own and use his constitutionally-protected slave property. But if slavery "was somehow the cause of the war," an assist may nevertheless be credited to the Supreme Court. Dred Scott was only the second time the Court had ventured to strike down a federal law. In the half-century which had elapsed since Marbury v. Madison, the Court seemed to have forgotten all that Marshall had taught, explicitly and implicitly, about the conditions surrounding the fruitful exercise of the power of judicial review of federal legislation. All that the Court remembered in 1857 was its power. And blind assertion of that power simply forced our languishing governmental apparatus into bankruptcy. But of course it's entirely possible that bankruptcy would have ensued in short order whatever the Court had done.

II.

Although, as Lincoln noted in his Second Inaugural Address, at the war's beginning "the Government claimed no right to do more than restrict the territorial enlargement of /slavery/," the course of the combat expanded the war's aims. The Emancipation Proclamation, coming at the mid-point of the war, announced the liberation of the slaves in the rebellious states. Thus, the Proclamation was primarily a military and diplomatic tactic. But it also served notice that Union victory would mean the permanent abolition of slavery on every inch of American soil. And within six months of the war's end the Thirteenth Amendment had written this result into the Constitution.

War and the Thirteenth Amendment could end slavery. But more was needed to counter the South's efforts, through the Black Codes and otherwise, to keep the freed Negroes in a permanent pariah status. Moreover, even in the North, Negroes could not attain full membership in the American community so long as *Dred Scott's* concept of American citizenship as a white club remained the prevailing constitutional rule.

Wherefore the Radical Republican Congress drafted the Fourteenth Amendment, and made ratification of the amendment by the seceding states a precondition of their return to equal status in the federal union.

Broadly speaking, the chief purposes of the Fourteenth Amendment were three: The first was to confer national citizenship on "all persons" born in the United States or subsequently naturalized pursuant to federal law (and, as a corollary, to confer state citizenship on all American citizens in their state of principal residence). The second was to protect the newly emancipated Negro from hostile state laws, or other manifestations of state governmental power, discriminating against him because of his race or his prior slave status; this constitutional purpose was sought to be accomplished by denying the states the power to "deny to any person . . . the equal protection of the laws" or to (and here the Fourteenth Amendment repeated the Fifth Amendment's limitation on national powers) "deprive any person of life, liberty, or property without due process of law." The Amendment's third major purpose was to force states to permit Negroes to vote: any state abridging the franchise of a male twenty-one year old citizen was to have its representation in the House of Representatives reduced in proportion to the number of potential voters thus discriminated against. Finally, Congress was given power to enforce the Amendment "by appropriate legislation."

In part because the reduction of state representation in the House is a very severe sanction which, seemingly, can only be enforced by Congress, the franchise provisions of the Fourteenth Amendment have been highly ineffectual. Indeed they have been largely superseded by the Fifteenth Amendment's flat prohibition on any state denial of the vote on the basis of "race, color, or previous condition of servitude." This prohibition made it possible for individual Negroes to litigate in court discriminatory denials of their right to vote, and thus to secure decrees enforcing their individual rights but not affecting the discriminating states' representation in Congress. In fact, the subterfuges employed by the southern states to bar Negro voting -- e.g., poll taxes; literacy tests administered in a discriminatory way; "white primaries" from which the Democratic Party (not the "state") barred Negroes, but which were the only significant elections in many southern states -- have been so effective that only within the last two decades have Supreme Court decisions, recently supplemented by the vigorous efforts of the Department of Justice and private voter registration groups, brought about an appreciable rise in Negro voting in the South.

With respect to the over-all protection of Negro rights contemplated by the guarantee of citizenship and by the equal protection and due process clauses, most of the Fourteenth Amendment's impact has come from judicial rather than from Congressional efforts, and this notwithstanding the obvious expectation of the amendment's framers that Congress would be the principal champion of Negro rights. Initially, however, Congress, in the period of Thaddeus Stevens' and Charles Sumner's Radical Reconstruction, made strong legislative efforts to assure equal treatment of Negroes, and these efforts were largely frustrated by the Supreme Court. Thus Congress, in 1875, enacted the last of several post-Civil War Civil Rights Acts. Earlier acts, guaranteeing Negroes the same rights to make contracts, participate in judicial proceedings, etc., as those enjoyed by white citizens, were so plainly harmonious with the equal protection clause that their validity was hardly open to question. But the 1875 act went much farther. In terms closely comparable with the legislation proposed by President Kennedy to Congress in 1963, the 1875 law made it illegal for places of public accommodation -- hotels, theaters, railroads, etc. -- to refuse service to anyone on grounds of race or color. But the Supreme Court, in the Civil Rights Cases, in 1883, held the law unconstitutional. The Fourteenth Amendment, the Court said, dealt only with discriminatory "state action." The racial policies of places of public accommodation were said to be matters of the private choice of the proprietors, notwithstanding the fact that these were businesses authorized by the states to cater to the public. Since, as the Court saw it, the states were not responsible for these private business choices, Congress had no constitutional power to affect these business policies. Justice John M. Harlan -- a one-time slave-owner, who fought in the Union army, but who opposed the Thirteenth Amendment as an infringement of states' rights -- dissented. (Justice Harlan's grandson, John M. Harlan, is a current member of the Supreme Court.)

By the time the Civil Rights Cases were decided, not even the Republican Party mourned the demise of the 1875 law. Pursuant to the Compromise of 1877, Republicans and Democrats alike were in substantial agreement that henceforth the South could handle its problems -- i.e., Negroes -- in its own way. Armed with this informal license, the southern states in the 'nineties began to reinforce private discriminatory choices (of the sort sustained, as against federal regulation, in the Civil Rights Cases) with legal sanctions. For the next sixty years, Jim Crow laws fastened segregation on every aspect of public southern life. The impact of these laws has been very succinctly described by Professor C. Vann Woodward in The Strange Career of Jim Crow:

> . . . The Jim Crow laws applied to all Negroes -- not merely to the rowdy, or drunken, or surly, or ignorant ones. The new laws did not countenance the old conservative tendency to distinguish between classes of the race, to encourage the "better" element, and to draw it into a white alliance. Those laws backed up the Alabamian who told the disfranchising convention of his state that no Negro in the world was the equal of "the least, poorest, lowest-down white man I ever knew." . . . The Jim Crow laws put the authority of the state or city in the voice of the streetcar conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum of the public parks and playgrounds. They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted, or deflected.
>
> The Jim Crow laws, unlike feudal laws, did not assign the subordinate group a fixed status in society. They were constantly pushing the Negro farther down. (108 U. of Pa. Law Review 27-28.)

In 1896, in Plessy v. Ferguson, the Supreme Court gave its imprimatur of constitutionality to Jim Crow laws. The law there in question was a Louisiana statute requiring the segregation of white and Negro railway passengers; the law was compatible with the Fourteenth Amendment, so the Court held, provided that the railway cars assigned to Negro occupancy were equal to those assigned to whites. Thus was established the "separate but equal" doctrine. The heart of the Court's decision was its rejection of the contention that a legal requirement separating Negroes, qua Negroes, from the rest of the community was a denial of the equal protection of the laws. The contention appeared to be a very reasonable one, just as a matter of common sense, and seemed to be greatly strengthened by the Supreme Court's observation in 1873 (in the Slaughter-House Cases), when the drafting and adoption of the equal protection clause was still a matter of virtually contemporaneous history, that "the existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." But the Supreme Court, in Plessy v. Ferguson, found the contention unpersuasive because it did not find the compulsory separation of the races to be discriminatory:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one

> race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

Threading their way through the foregoing analysis are certain unrationalized and imperfectly articulated assumptions: (1) That the equal protection clause is only concerned with laws regulating the "civil" or "political," rather than the "social," relations of the races. (2) That a law requiring whites and Negroes to be separated in public places, or in the use of public accommodations, is a regulation of "social" rather than "civil" relationships. (3) That to construe a legislative act (such as the Constitution) as an attempt to modify "racial instincts" or "social prejudices" would be foolish, since law is "powerless" to affect these aspects of human behavior; specifically, law cannot cause the "inferior" (Negro) race to a level of equality with whites. (4) That a constitutional rule invalidating laws *requiring segregation* would be tantamount to "enforced commingling of the two races" -- an assumption which seems to leave little scope for the Court's suggestion that it might be possible for the "two races . . . to meet" as a result of the "voluntary consent of individuals." Taken in their totality, these assumptions comprehended a thesis about the role of the Negro in American public life which was to hold sway throughout the South, *and* at a national level, for nearly half a century.

The thesis was, in essence, that racial antagonisms are instinctual, that they correlate with objectively identifiable inequalities between the Negro and white races, and that the law cannot mitigate these inequalities or their attitudinal consequences. When *Plessy* was decided, the thesis was highly congenial to the dominant white majority's desire to let the Civil War's by-gones be by-gones and to sweep the Negro's desire for equality under the rug of restored national harmony. And when, only a few years later, the United States assumed an imperial mien and turned a covetous eye on backward islands, the thesis proved readily transferable to other nonwhite peoples. Also, the thesis received some contemporary philosophic -- and, assertedly, quasi-scientific -- support from the powerful writings of the first great American sociologist, William Graham Sumner.

In short, the Supreme Court, in *Plessy*, was probably articulating what most white Americans felt. Nevertheless, neither the rationale nor the holding of *Plessy* was persuasive to Justice Harlan:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not that it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.
>
> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

If the white views which underlay Plessy were closer to William Graham Sumner than to Charles Sumner, it should be noted that these views were not fully and uniformly repudiated by the handful of articulate Negro leaders. Indeed, much of what Booker T. Washington urged on his fellow-Negroes added up to a counsel of conformity: the Negro's way to succeed in a white-supremacist world was conceived to be through the acquisition of those habits of industry, cleanliness, thrift and sobriety which would lead the white man to recognize the Negro as a trusted and devoted aide, not a competitor. But in the second decade of this century new Negro voices began to be heard: The founding of the National Association for the Advancement of Colored People marked a formal and institutionalized rejection by Negroes (and even some whites) of the basic postulates of white supremacy.

One of the chief avenues the N.A.A.C.P. pursued, to realize its program, was litigation. To expect helpful results from the very agency of government which had produced the Civil Rights Cases and Plessy required a long and optimistic view of social processes. Indeed, after Plessy it was quite hard to see what kinds of governmental assaults on Negro dignity (apart from outright exclusions of Negroes from public life, such as keeping Negroes off juries) might come within the purview of the Fourteenth Amendment. And the fact is that for many years the process of segregation by law received only one substantial setback at the hands of the Supreme Court. The case was Buchanan v. Warley, decided in 1917. There the Court overturned a Louisville ordinance prohibiting Negroes from occupying homes in a block the majority of whose dwellings were occupied by whites, and vice versa. However, the Court's rationale is peculiarly instructive. The ordinance was, to be sure, invalidated on Fourteenth Amendment grounds. But the relevant provision of the Fourteenth Amendment turned out to be the due process clause. What the ordinance infringed was "liberty," and the liberty involved was that of a white land-owner to sell to a Negro would-be purchaser free of governmental interference. For the Court had, by 1917, long since converted the due process clause into a shield with which to protect business activity from state and local regulatory (i.e., in the judicial lexicon, "hostile") laws. In Buchanan v. Warley the Court's chief doctrinal solecisms had a chance encounter: the inflated due process clause redressed the imbalance of the equal protection clause.

In the 1930s and 1940s the N.A.A.C.P.'s long litigation campaign began to bear fruit: Various subterfuges employed to keep southern Negroes from voting fell by the judicial wayside. The Supreme Court became increasingly exercised about law enforcement malpractices (such as denials of counsel, and coerced confessions) which bear heavily on the indigent and especially on the Negro indigent. The Court adjudged certain segregated state universities to be unequal and hence constitutionally inadequate. And in 1948, in the momentous case of Shelley v. Kraemer, the Court held that judicial enforcement of private racially restrictive covenants was discriminatory state action not compatible with the equal protection clause. The case was of great practical importance, since it upset the chief device used to put legal sanctions behind residential segregation after Buchanan v. Warley outlawed racial zoning ordinances. And the case was of even greater doctrinal importance, since it manifested a newly sophisticated judicial recognition that when nominally private discrimination requires governmental support in order to be effectuated, the discrimination may be attributable to the state and hence within the ambit of the equal protection clause.

Attempting to supply explanations of judicial trends is a chancy and not always useful undertaking.

Suffice it to note that this judicial trend (a) was closely geared to markedly increased judicial hospitality to a range of civil liberties -- e.g., free speech, and fair procedure, and (b) came against a back-drop of vast social changes accelerated by depression and war. Millions of Negroes had moved north and become urbanized; hundreds of thousands had vastly improved their economic lot as members of a newly unionized labor force; a small core of the most fortunate had gained advanced education, business and professional and artistic status, and social and political influence. The Negro's new legal image, in the North, was signalled by the multiplication (intensified after World War II) of state and municipal laws designed to protect Negroes from racial discrimination in places of public accommodation, in employment, and in housing; by 1963 thirty-two states in the north, mid-west and west had adopted laws barring discrimination in places of public accommodation.

The judicial trend of the 1930s and 1940s culminated, in 1954, in the School Segregation Cases. The unanimous Court held:

> . . . that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

Because the Court did not feel that the southern states could be compelled to dismantle their dual school systems forthwith, but only "with all deliberate speed," only a small fraction of southern school children actually attend integrated schools today. But the number is growing, albeit slowly. Anomalously enough, it is probably true that northern schools are on the whole growing more segregated, since the steady influx of Negroes into northern cities is concentrating larger and larger Negro population in ghetto areas.

Decisions following the School Segregation Cases have made it plain that Plessy's "separate but equal" doctrine has been displaced not merely in the field of public education but in all realms. The Court has finally vindicated Justice Harlan's understanding of the Constitution: ". . . in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind. . ."

III.

In Dred Scott the Supreme Court made the catastrophic error of withdrawing from legislative competence an immensely difficult and important public problem which Congress had, for more than a generation, shown some capacity to deal with. In the School Segregation Cases, the Court acted in an opposite sense: it restored momentum to a public problem of comparable dimension, resolution of which had been stalled for decades by (a) the Court's own prior decision in Plessy, coupled with (b) Congress's demonstrated incapacity to assume responsibility for the problem. Given this nation's unique constitutional arrangements, under which such enormous powers of political choice are entrusted to the judiciary, sustained constitutional litigation was -- as the N.A.A.C.P. foresaw nearly two generations ago -- the indispensable predicate to an ideological revolution, and an ensuing social revolution, establishing Negroes as equal members of the American community.

The social revolution -- built on the legal and ideological triumphs of Walter White, Thurgood Marshall, and Roy Wilkins -- is now in its clamorous infancy. Viewed as a mass movement, it may be dated, somewhat arbitrarily, from the first sustained campaign of protest undertaken, in this century, by a large southern Negro community -- the Montgomery bus boycott of 1956, led by an obscure young clergyman, Martin Luther King, Jr. In the intervening seven years, new demonstrative techniques -- "sit ins," "freedom rides," etc. -- have signalled wider and wider participation by Negroes, and whites, in both North and South, in efforts to realize promptly the commitment to equality which is now part of our stated national goals. Superficially, the national scene in 1963 -- the centennial of the Emancipation Proclamation -- is one of turmoil. But under the turmoil is a deep, and deepening, substratum of fidelity to the law's processes, and progress in consonance with those processes. In the eye of history, it may well seem less important that federal troops were required, in 1962, to secure the admission of a Negro to the University of Mississippi, than that none were required, in 1963, to secure the admission of Negroes to Clemson and the University of Alabama. In the same way it may, ultimately, seem less important that the Birmingham police, in 1963, used police dogs to curb citizen protest, than that in the following fortnight Negro and white leaders agreed on procedures intended to initiate the dismantling of the city's racial barriers.

b. EQUALITY DISCUSSION HIGH POINTS

Mr. Coleman

I was wondering, rather than equality whether the real problem is not one of citizenship? The question in democratic society is 'what are the minimum rights that a citizen ought to have'? Do you think it is fair to accept the concept that people who have two million dollars ought to have two votes whereas people who have only ten thousand dollars have one vote? If you pose this question to students you would begin to get agreement and once having gotten it you would move into other questions. Whether or not the government ought to give benefits or withhold benefits based on something as irrelevant as race? By that time, if it is done properly, the school system in the north or the south would probably generally get agreement.

The teaching of equality requires extensive understanding of the history of the Negro in the United States. The Negro did not have citizenship from the Constitution. Justice Taney was right according to what followed the Dred-Scott decision. Once you make the assumption that a person is not a citizen, you have a period when verbal agreement that he does have citizenship does not really operate. The majority did not believe or did not want to believe it. Only after a consensus formed among the majority that the Negro ought to have citizenship did you get acceptance of the concept to the point where the problems, like separate schools, could be solved.

Mr. Craig

I think somewhere along in the teaching process it ought to be pointed out that the statements of principles as outlined in the Constitution and the Bill of Rights are statements which were by necessity compromise statements. It was mentioned earlier that maybe we need more rights but nevertheless the rights that were set forth were the result of the compromises at the time they were made.

When Professor Pollak attempted to use the Negroes' membership in the American community he did so as an example of some of the problems that arise under the phrase "Equality." The words "that all men are created equal" left alone are ridiculous. I do not mean to be disrespectful but biologically this is not true. I think we have to teach young people what was meant. In order to do that you have to go back through the history of the entire development. Professor Pollak refers to the situation in Virginia at the time of the adoption of this Bill of Rights. He points up that nothing was said about the slavery issue at all. Historically, if I am not incorrect, the question of slavery in Virginia at that time was a very burning issue. It was a matter of compromise that it was left out of consideration because it could not be solved at that moment.

This method of teaching by the use of example is vital to the educational process. Also a sufficient number of examples must be used so that the student has the full view. When you approach the problem of trying to define or discuss the problem of the subject of equality there cannot be a limit on the examples. I am pointing out the necessity for a firm, historical background in the whole process of education in the field of Constitutional law or the philosophy of the Constitution of the United States and the Bill of Rights.

Professor Hurst

Professor Pollak's paper leaves me dissatisfied as to the total concept of equality it presents. It takes in the easy cases, in a sense of value choices, and broader ones ought to be presented as well. For example, one is the problem of selective implementation of public policy, selective law enforcement. You can be sure that the community will not pay the bill for complete law enforcement. This poses severe substantive issues of equal protection of the law. Second, a major problem of equal protection of the law is how to fit into the picture the activities of the characteristic lobby or interest group as it works upon the legislature. Third, there is a very real and difficult problem to get straight in total philosophy. It has to do with the relations between quality and equality and the real dangers in our kind of society that the power of the organized state will be used in many subtle ways to deny equal protection of the law to people who have other selective interests or tastes. For example, the Federal Communications Commission and its relation to the mass media of communication is a major problem of equal protection of the law. I think there is a major problem for consideration whether we are spending public money in maintaining the whole apparatus of public regulation in the FCC field in effect to underwrite discrimination against the small scale audience. I do not suggest that we should take classroom hours on all these matters. There should be available to teacher and student a broad range of analysis to cover such a scope of problems. These should be assigned reading and drawn upon as appropriate cases are discussed.

Professor Emerson

A difference of opinion about the scope of the concept of equality is developing. One group wants to take as the scope the entire range of socio-economic, general equality questions. The other wants to deal with the question as it is presented in Constitutional terms, primarily under the equal protection clause.

If we take the first, we are then involved in the very difficult problem of formulating a conceptual framework. We have to deal with questions of the relationship to liberty, for example. If we are confining ourselves to the Bill of Rights question, we are in a much more limited field. We should make the decision in favor of the narrower scope of the conception of equality. Within that field, I think the conceptual framework is not too difficult. You start off with the very general proposition of the purpose of the equal protection clause and perhaps other provisions of the Constitution. You then move to other problems, including the historical background. Professor Pollak's paper is primarily concerned with what needs to be considered there. Then you include aspects of particular current problems that deal with the Constitutional rights as they exist today. I favor Judge Hastie's suggestion that additional ideas on the concept of equality other than as framed in Constitutional terms should not be considered. A subsidiary issue is whether the question of Negro rights is the key question and gets the priority in discussing Constitutional equality. It would seem to me that it should, simply because it is the primary, dominant issue oőf the times and will be for some period. That does not mean that, as Mr. Craig pointed out, one should not deal with the historical aspects or other related issues, or that equality should not be placed in a broader context to some extent.

Professor Rogow

I agree with the last part of Professor Emerson's statement but not the first part. The approach we are developing gradually here is too legalistic and too narrow. The teaching of equality involves not merely a history of the doctrine of equality, not merely a recitation of the leading Supreme Court cases, but involves a full exposure of the conditions that nourish inequality in the United States.

There is an assumption that Americans favor equality. You can argue from history that Americans do not favor equality, that indeed inequality of condition is a going way of life in this country. Inequality has a very important function. People benefit from the economic function when the Negro is charged more, paid less, exploited in housing. Psychologically, there is evidence that many white people get a lift out of Negro inferiority. Also, the guilt feelings that exist are in some sense appeased by justifying the guilt in terms of the behavior of Negroes, saying they are treated this way because of the crime rate, the venereal disease rate, etc. Even politically, people benefit from Negro inequality as political history shows. A number of politicians owe their jobs to this. A number of machines in the major cities have been built to some extent on the hands-out position of the Negro politically.

To approach the question of equality from a legal or Constitutional point of view mainly or primarily, is to miss reality. Most Americans are not willing to go as far as the Supreme Court is willing to go, especially in terms of social equality. To get to that problem goes well beyond the Constitution and the Founding Fathers. It goes to the heart of what we may call the American mind, the American character, the American culture. To teach this in the schools is the foremost job of anybody who is concerned with doing something about it.

Another neglected area is Negro history, except perhaps the history of slavery. Neglected is history in terms of the African background and the highly developed cultures in Africa before the white man. Education should contribute to the foremost necessity of getting a dialogue going between Negroes and Whites. We are not in contact. Our kids are not in contact.

Professor McCloskey

One of Professor Emerson's implications is if you do approach the subject of the equal protection clause initially, which would be my own preference, you have a concrete thing, a focal point which would make it possible for a group like this to discuss a specific thing rather than a series of abstractions.

The second level of our considerations, the student interests, having been given a concrete starting point, could ramify into these other approaches. The great advantage of starting with this concrete focus point is that you are free to go beyond it to any sociological implications you could draw. How could you talk about the history of the equal protection clause in the last nine years without talking about sociology? Yet rather than start with sociology you can start with the equal protection clause.

Professor Hurst

I cast a strong vote in favor of the broader approach. Education should be a liberal education and not merely a technical and tooled education. Concretely, that means you ought to teach theory. You should always be teaching children to look for cause and effect in the widest range in which they can think of it and that is all that theory means.

Professor Simon

Professor Pollak's paper points out the things that students do not see. For instance, we have a tendency to present good guys and bad guys. At this moment in our history, the court is the good guy; the Congress is the bad guy. Quite obviously, in the 19th Century, under the Dred-Scott decision, under separate but equal, the court in many ways looked like the bad guy and the Congress looked like the good guy. I think they should realize that history does operate in this way and that problems are developed in this fashion. The sides switch. This is an important thing for them to understand. It would be a grave mistake if we let them be simply sociological problems that we are faced with right now. That is the simplistic approach that they are now getting in the schools. They need some intellectual content that they can apply.

Professor Westin

I would like to see a broader framework into which Professor Pollak's framework would fit. Aristotle's point should be made about the struggle over equality being one of the greatest causes of dissension and revolution in the state. The struggle is between those who already enjoy positions of privilege to keep their privileged positions and those who are denied privileged positions to gain that privilege. The struggle over equality is one of political struggle and group conflict in any society, no matter how it is organized, politically or socially.

Second, a discussion should be presented of why a legal guarantee of equality is necessary in a society that believes in the rule of law. Here Professor Rogow's important comment about sociology should be applied. This can be done very simply for high school students by pointing out that if you are in the majority group, whether it is in your local community or in the national majority, what equality means is that you can be served any place, buy anything, rent any housing, because your group is part of the accepted class. Equality comes to you because of what you are and what your local society considers to be citizenship. Law enters to define equal rights in order to give people entry into the accepted group where they were not given it by the process of society without law. What you are doing is stretching the definition of citizenship beyond that which the existing society was willing to give without law or government's intervention.

Next, the fact should be discussed that in American history there have been a series of different equality issues. Racial inequality is one which high school students should see in the context of religious inequality, national inequality, inequality by sex, inequality by property, inequality by education. The reason one must present this historically is that as our history is unfolded, we progressively said that each is improperly used as the criteria for equality. The woman's right to vote, for example, took a time being won. But once won, it was wholly won. Another example would be that property qualifications for exercising the franchise, based on free hold interests, back as it was in the colonial or earlier periods, came to be regarded as wholly illegitimate as an equality criterion.

Professor Westin

I agree with Professor Pollak's orientation. There is a progression of issues in which society, out of a changing mix of the population, ethical standards, more government intervention, etc., concludes time after time that this particular criterion is not acceptable. I agree that the Negro issue should be at the heart. It is the one area in which we have inequality today in a way that is the essence of our whole struggle for a democratic society. The average student today should see that American society has repeatedly brushed aside other kinds of equality discriminations as illegitimate. We have used law to do this brushing aside. Today's student should see that only to the extent that we can solve the problem of equality in the context of the Negro will we then have realized the principle of equality before the law. This is the level at which law and government come in.

Without this broader context the average student would not understand, in a way we would like him to, why the Negro issue is central. It is central for these reasons of the theory of government, the theory of society, the role of law in settling other inequalities.

Professor Pollak (Intent of Author)

It was not my purpose to suggest that the race and Negro question should be the sole target in the equality area. I am not even prepared to say with any conviction that it should be the centerpiece; I think it is, at least, indispensable to consider the historic legal development which is beginning to result in the inclusion of American Negroes within the American community. What I tried to do was to take this one development and concentrate on it to see if I could offer a sample of a way of presenting historic legal developments in the equality field. This could then be reproduced in relation to other themes that have been cataloged. I did not expect this to be a comprehensive catalog. Others will supplement that catalog. In some cases, some of the supplementary ideas, perhaps, could be grouped within some of the groups indicated here. For example, Professor Hurst mentioned the crucial problem of the interrelationships of interest groups, of lobbying. This subject matter is very close to what I was suggesting when I spoke of the relationship of the structure of our legislative institutions to protection of the interests of different claimants seeking preference. My main point is simply that there would be a number of problems of equality which should be examined in some depth, if not at this seminar, in subsequent conferences, to see if a consensus could be reached. Could some body of subject matter be said to be something that was an indispensable minimum at least, say, with respect to the problem of the franchise, so too with economic opportunity, so too with justice under law and so forth?

This kind of paper could have value to a text-writer to use as a check list of things that he would not want to forget about. He would want to restructure it and correct the historical errors. He would do the same kind of job with some of these other themes. They could then be the bases of other sections of the text. The text would be used after we have educated our teachers in the basic American history courses and in the high school courses of American history and problems of democracy. These two historical and problem-solving techniques of pedagogy would intersect, I suppose. They are indispensable if we are going to recommend the study of this kind of problem to school systems and to teacher groups.

I was impressed by two proposed formulations. Professor Westin's notion of how one would relate this theme of Negro equality to others that he suggests are examples of the law having already worked its magic, has some merit. I am not sure that I agree that these other processes involving equality have been fully worked out, that that is a matter of detail. His very interesting assimilation of the Negro theme to the question of equality for women or the working out through our legal and social mechanisms of the role of religion in the American community, and the economic problems, seems to me a very fruitful suggestion. I have the same feeling about the O'Neil-Coleman citizenship rubric. Actually, I think it is entirely possible that on examination these two would turn out to be quite similar sorts of syntheses. I would be perfectly happy to see this single theme that I have looked at assimilated to other themes in either or both of these suggested ways.

One last point is that a number of these themes that I have identified as equality themes could as easily be identified, indeed if we look at the other papers, have been identified, as justice themes and as liberty themes. Our four papers overlap. We are really not talking about four different problem areas but one problem area which perhaps was most comprehensively stated in Professor Hurst's paper. I think that is the great value of his position.

Chairman Jones

Suppose we put back to you Mrs. Peyser's opening question. She asked us to consider the concepts with which we are now wrestling, at an ideal level. What should the contents of a high school program on the Bill of Rights be insofar as the equality ingredient of the Bill of Rights is concerned? What would be your definition of the essential attributes of equality which you think have to be communicated whether by discussion of the problem of racial equality or by classroom use of a whole complex of problems?

Professor Pollak

I think what we are talking about is something that comes very close to what Mr. Coleman was getting at. We are asking what are the indispensable attributes of human dignity that we in this country have committed the state to protecting and maintaining? I can conceive of the concept as stated in this question being explored without relation to the theme I have discussed. One could explore all of what Mr. Coleman and Mr. O'Neil have called the citizenship syndrome, in terms of the franchise, of economic opportunity, of one's status before a court of law, of what differentiations accrue because of sex, or alienage or religion or what not, and one would not have a word to say, necessarily, about the development of the rights of the American Negro until some dewy-eyed student would ask, 'By the way, who's in this club? How do you recognize the person who's an American? Does he wear a yellow armband? Suppose he lives on an Indian reservation or suppose he is a Negro?' At that point, we come to my problem. In 1964 one cannot leave that problem aside very long. This is a problem of simply stating whether this classification of people who happen to add up to something like 15% of the population, belong within the range of human dignity or not.

Mr. Craig

I am interested in Mr. Dorsey's remarks because it occurred to me that when we talk about equality, are we really talking about a moral concept? Nobody has said this yet. I will suggest that this is a moral concept. We progressed to a point historically when we announced a philosophy of equality - a moral concept, old as man, in the Declaration of Independence and the Bill of Rights and we are still living with it. We are making some progress in this moral concept, if we have not achieved it yet. We are concerned here with teaching it to another generation that is coming along.

Mr. Pemberton

The moral concept has had an important relationship to how we have adjusted our social order over the entire history of our nation. We have this problem of limited time in the curriculum and of assigning priorities. Professor Pollak has suggested to us one issue that has persisted in one form or another through the history of our Constitutional development. It is better not to teach a moral concept, but to deal in terms of illustrating the different accomodations different generations have made to the moral concept. In accomodating a practical life is structured. The question for teaching is where has that left us today?

Finally, it has been suggested that one of our purposes ought to be not to give answers to the students because we know in our own experience that there are not final answers to all the Bill of Rights problems. We also know that it is one of our Bill of Rights principles that the public schools at least ought not to lay down an orthodoxy for all Americans to accept. We do not allow them to do it in religion and I do not think we can allow them to do it here. What they must do is train minds to deal with these problems and create an awareness of the history and principles that structure the problems. All of these points that this discussion has developed suggest, contrary to Judge Weigel, that Professor Pollak has picked the case study for illustrating the problems we have lived with in equality and the one which remains unsolved in this area. We do end up then asking questions rather than giving answers.

Mr. Coleman

I understand that the Constitution does not give anything affirmatively. All I ask from government is that when they attempt to exercise the awesome power of government, it be done in accordance with the Bill of Rights in a nondiscriminatory fashion. Once accepting that, you say that citizens have the right to exercise power only because government cannot prevent them from doing it on a rational basis. Then society has an interest to see that those powers are exercised intelligently and responsibly. If I am to give "A" the right to vote, I cannot take it away from him because the Constitution says I cannot. I have an interest in making sure that when "A" votes, he votes intelligently. Since voting and most political processes are a matter of compromise, it is to my interest to see that I associate with B,C and D in such a way that they will understand my problem and therefore vote responsibly. That is the reason why I think it is important for even a majority society to make sure that everyone gets an opportunity to go to the same school. Once you assume that government cannot operate any of its powers in irrational fashion, then society has an interest to make sure that people will act responsibly. When each citizen has the same power, it is to the interest of society to establish a standard which is much higher than the minimum. The Constitution only tells you what you cannot do to Joe. It does not tell you to associate with Joe or to understand his problems. This is the only way that you can make sure that when Joe has an opportunity to deal with you by government power he will do it towards you fairly.

Dean King

I agree with Mr. Craig's point. It is my judgment that unless the legal concept and the moral concept go together, neither is much good. Unless the moral attitude of the people supports the principles of the Bill of Rights, the Constitution will not afford good protection.

The question of religion is equally as important as race and perhaps even more difficult. In some respects they are very much alike in this area of equality in that the Constitution knows no religion and the Constitution knows no race. I think we would be making a mistake to confine our discussion to the Negro question.

Professor Pollak

Professor Starr's comments (see Courses of Study, page 171) triggered a thought about priorities and when it might be most fruitful to introduce some of these problems to students. By way of example, I would suggest that any meaningful exposition about religious diversity and about the relationships between religion and the legal community is about the most difficult body of ideas to get across. Those are indispensable elements of the equality picture. I guess they should be reserved for the highest level of sophistication, the latest grade level. On the other hand, these problems about equality without regard to race are easiest to absorb the earliest you get to kids. Maybe we have more time at our disposal in the school years than we think we have. We could think about introducing some concepts earlier and some later.

Professor Emerson

It seems to me that there is a basic problem and that is whether or not we address ourselves to the question of the Bill of Rights or, to put it in other terms, to the rights guaranteed by the Constitution or the rights enforceable through legal institutions, or whether we address ourselves to the much broader question of the general social and political and economic ideal that we would like to see. It seems to me an absolutely basic question that we have to decide. If we do not decide it in relation to this issue, we should probably consider it in relation to all the others and decide it in the end. My view, which I hold at the present time, and which may be changed, is that it has to be confined to the Bill of Rights and to the Constitutional questions. Otherwise we are plunged into a morass of vague, ambiguous, controversial issues which are politcally such dynamite that we would never get anywhere with them. I agree with Mr. Coleman that the Constitutional rights are minimum rights and that is the strength of them. They are minimum rights in the sense that they represent a certain consensus. They have legal support in back of them. It is the whole strength of the Negro movement over the last years, that they are in tune with legal rights of the Constitution and all that that implies and that that has to be the entering point. I just do not see how we can enter from any other point.

Once you enter from that point, then I think we can spread out to a certain extent. That depends on what we do when we get down to particular issues and how far we go. But unless we talk about the problem in terms of the Bill of Rights and the Constitutional limitations, as the beginning point of what we are trying to get over, we are not going to get anywhere in this discussion, nor with school systems, nor with what the community will accept, nor with what the teachers will understand. I think we have to discipline ourselves to talk in these terms.

Now, in those terms it seems to me these are the issues: what are the conceptual notions behind the Constitutional provision of equal protection of the laws? No suggestion here goes beyond the obvious one that it is, in a general sense, equality of treatment by the law, or general equal rights to opportunity of participation, and so on. Now, if there are any other suggestions as to what doctrinally it means, we should have them out.

Then we come to the question of the historical relevance of this. Here, we ought to concentrate on what should be added to Professor Pollak's paper in terms of the historical background and the historical significance. The suggestions made by Professor Hurst and Professor Westin are very appropos. We ought to have more of that sort of suggestion.

Then, the third question is some sense of the priorities to be given to the specific issues we talk about. If, as we agree, we ought to talk about current problems, and I think we are in general agreement that we should talk about current, specific, concrete problems that are raised, what are they? Obviously, the race problem is the main one and one which is impossible to avoid. Any school teacher who attempted to talk about equality without talking about race problems would be laughed out of school. It cannot be done, in my opinion.

Now, what are the other current problems? The only ones that I see that are significant in terms of what the courts are doing are the questions of the poor against the rich, equal protection in terms of right to counsel and so forth, and that extends very far, long beyond the question of holding property in the sense of real estate, to vote and so forth. But those are frontier issues that have hardly begun to be developed by the courts. The courts are beginning to talk about equal protection in cases of economic regulations designed to harass some particular person, but that is only the beginning and that has not developed very far yet. I cannot see that there are serious problems of equal protection in terms of religion; that is settled. The problems of religion are different problems - the relationship of church and state, which is another area we have not come to. The problems of sex are theoretically settled. Or rather, they are not a major problem now unless the movement to incorporate women's rights into the 14th amendment gains ground in the courts. Essentially, therefore, the problems now are really race problems. That does not mean that we should present the problem of equality as solely a race problem. This is where, it seems to me, history comes in and Professor Westin's contribution becomes important. It puts the matter in context, in perspective, which shows that this is the problem we are now dealing with but it is only part of a broader problem. It seems to me that these are the issues that we ought to be addressing ourselves to. I agree with Mr. Craig that it is a moral problem and so forth, but I think we have to discipline ourselves to talking in much more concrete terms than that, that we cannot present this in those general terms; it just is not feasible to do it that way and I do not think we are going to make any progress that way.

Professor Westin

I was very much struck by Professor Freund's comment on the whole question of the New York school prayer, when he said that he thought the Supreme Court had made a mistake by putting it on a separation of church and state ground, and thought that perhaps the court would have been on a sounder basis and a very different line of jurisprudence would have developed if it would have been placed on a religious liberty ground. I think in that sense you might argue that there is still an equality position because I think religious liberty has a strong equality overtone to it. There is a stigma that is involved in certain minority religions which are not given, the question is should they be given, certain status which majority religions can claim as a matter of being part of the Judao-Christian mix that is the official, accepted religious foundation of our society. And conceivably here the question arises of whether there is a fourth religion which is known variously as humanism, agnosticism, atheism or whatever form a nonreligion, irreligion perhaps, may take. To me, this still could be put, if you wanted to put it that way, in equality terms. If you do that, I think that the trouble you run into is that this does not seem to be the way the courts are handling it these days. And so while it is intellectually sound, I would think, and Professor Freund's judgment I think is a sound judgment, the courts have been putting this on a separation of church and state ground and you would have to buck the tide of judicial development to deal with it in any other way. I do not know whether this is the way you were thinking of it, but that is why I think it would be a somewhat artificial construct if we raised this as an equal protection point at the moment, given what the courts are doing, unless we felt in the mood to provide a critique of the court's development of separation of church and state doctrine.

Professor Pollak

I simply wanted to express my very emphatic agreement not only in general but in detail with what Professor Westin had to say about the relevance of religious problems to this discussion. Of course, Professor Emerson is right that religious problems do not doctrinally arise as "equal protection" problems. I think Professor Westin is exactly right in saying that the way the court is now utilizing the doctrine which it denominates the establishment clause and its applications is simply the device they are using currently to insure as best they can a community in which religious activity is private, not state influenced, and that this is an absolutely central dimension of equality, using that word as a word which is larger than the doctrine of equal protection.

Professor O'Neil

Related to Professor Emerson's point, there are two themes that have been played upon which may suggest another line of answer to at least two of his three questions. On the one hand, both Dr. Starr and Mr. Coleman have pointed to the importance of treating equality or equal opportunity in terms of the responsibility of government not to treat the citizen unequally, not to act discriminatorally. I wonder if this does not broaden the range of material that we are concerned with under the rubric of equality. As Mr. Coleman pointed out, it certainly changes it to some degree. If we put this together with Mr. Pemberton's statement that we are dealing not only with the historical evolution of the attempt of one minority group or perhaps several to gain more equal treatment under law; we are also concerned with a contemporary survey of existing areas of inequality. Professor Pollak's paper obviously emphasizes the first more than the second. I wonder if the first of these areas, namely the historical evolution, the efforts of minority groups to gain greater equality, is not essentially the area to which Professor Emerson first refers, namely, the lawyer's concern with the Bill of Rights, the historian's concern and to some extent Mr. Craig's concern with moral law. I wonder if the second area, the survey of existing problems of inequality, does not get more closely into what Professor Rogow and Professor Westin have been concerned with.

Professor Westin

If you talk about the 11th grade, at least, as the place where we hope to talk about some ideas that would stretch the mind a bit, a point raised originally by Dean King might be useful for us to consider. You can argue that what has happened in American Constitutional law and in the application of Constitutional law to the choices of policy of Congress and of the state legislatures, has been that we have gone from a color conscious law, in which race was used to impose disabilities on people, to a second phase of the color blind law where, presumably, the standard was that race could not be used as a criterion, to the point we are at now, which unfolds the current debate about whether law can become color conscious again. Now the purposes are for amelioration or re-ordering the society in integration, not just in nonsegregation. The debate about color consciousness is now focused on things such as benign quotas in private and public housing, in questions of what school boards must do in order to rectify 50 or 75 years of sometimes deliberate, sometimes de facto, housing-based school segregation.

At high school level as well as in adult community education this is a wonderful topic. It shows what law is, what law should do, should not do. It poses deep questions about the responsibility of law to the society and social problems. If we talk about problems, this one is not in the broadest context of the Negro in society, but rather how we would deal with it if we agree the Negro racial equality issue is a central one. This would get marvelously good discussions in almost any classroom where a decent teacher would present it. It has an element of theory to it which, as Professor Hurst has said, is a good thing to try and pose in the context of the school. Yet it is based on historical experience, showing how law has gone through these phases. And it still has a policy aspect to it because it is clear that this decision does not rest only on what the judges do. It also depends on what the city council of Portland, Oregon, wants to do, as well as what the Congress might decide to do, and what the labor union decides to do and how its seniority system and the private sector would be defined. I just throw this out as an example of a problem that might be very useful for us to consider.

Judge Hastie

In terms of teachability, we can profitably leave the whole matter of religion for development in our thinking and discussion of liberty.

c. CONSENSUS STATEMENT ON EQUALITY

In conception and in direction of attempted movement, our society is equalitarian. Therefore, we suggest that the role of the Bill of Rights* in the practical evolution of human equality (along with liberty and justice) in our legal order should be a major part of any program of teaching the principles of the Bill of Rights. With reference to equality, teaching might well focus upon the equal protection of the laws as guaranteed by the U.S. Constitution and most state constitutions. This necessitates understanding and utilization of fundamental decisions of the Supreme Court. Equal protection teaching should be selective, developing ideas of general character and importance out of the study of particular controversies.

One useful frame of reference, both historical and current, would be provided by study and development of efforts to make the rights which most citizens** claim and enjoy a part of the experience of theretofore excluded or disadvantaged groups. Thus, the whole subject would be treated in terms of the unfolding of the institution of citizenship in the United States. The present controversy concerning the status of the Negro, obviously a matter of vital concern, is in historic context but a contemporary culmination of a process which has involved many disadvantaged groups throughout our history.

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* We mean a development that starts with the Declaration of Independence and includes the 14th amendment.

** We have used citizenry and citizenship as embodying a concept of the insiders, the accepted people and the advantages that they claim and enjoy and the process of bringing those advantages to others. To those unfamiliar with our thinking, it may suggest a distinction between citizens and aliens and the technical rights of citizenship. We do not mean this distinction.

Effective teaching of the meaning of the concept of equality as contained in the Bill of Rights may vary, in context and method, for different age levels and from teacher to teacher, but the object of the teaching must be to give the student an accurate understanding of the concept as contained in the Bill as well as of the problems involved in bringing about that equality. This permits, if, indeed, it does not require, teaching in terms of history, sociology, political science and other disciplines in the field of the behavioral sciences.

Drafting Committee

Judge Hastie, Chairman
Judge Frantz
Judge Weigel

3. LIBERTY

PRIORITY # 1 FREEDOM OF EXPRESSION

a. POSITION PAPER ON LIBERTY

by Willard Hurst
Professor of Law
University of Wisconsin

Neither the United States nor any state "shall ...deprive any person of life, liberty, or property, without due process of law", say the Fifth and Fourteenth Amendments to the Constitution of the United States. Among the values which these words declare, we have regarded "liberty" as giving meaning to the rest. For in liberty, or freedom, resides the hopeful and purposeful energy which allows men to realize satisfaction out of life, or property, or legal order.

Liberty refers to a quality of life as men actually experience it. Hence it is fitting that we discuss liberty in concrete terms, of what people have wanted and striven for in a particular time and place. Thus this essay sketches what liberty has meant in the behavior of people in the United States. It deals mainly with what liberty has meant here since the adoption of the Federal Constitution in 1789, though we should recognize that what we talk about has roots that run back particularly into English history of the seventeenth and eighteenth centuries. Our definition of liberty has the more concreteness, because so much of it is embodied in law. There is hard reality in effective law. This is because law involves the legitimate application of force in men's affairs and because (in order to decide for what ends force shall be applied) law making requires men to make unusual effort to define what they really want and how they propose to go about getting it.

Both realism and principle require that a discussion of liberty center on the relations of freedom and law. This emphasis is realistic, because men enjoy liberty in a social context, and of necessity life in society involves a good deal of regulation and adjustment of men's interlocking affairs. This emphasis derives from principle, because liberty can fulfill life's better possibilities only if it is responsibly used; since law holds the legitimate monopoly of force in our society, we look much to law to define and enforce standards of responsibility in the use of freedom.

Areas of Liberty: Action, Thought, and Feeling

People in the United States have given a very practical meaning to their idea of liberty or freedom, as they gave this idea expression in law. A man has liberty or freedom when he has--and in proportion as he has--an effective range of choices as to what he will think and feel and do as he lives. Liberty or freedom consists in possessing an effective array of opportunities for determining or at least substantially affecting what kind of a life one has. Moreover, people have seen the idea of liberty as having like meaning for groups, business firms, social clubs, churches, colleges.

Our idea of liberty as the possession of a range of choices has always included the idea of choices among ideas and emotional outlets (as through art and literature or political belief) as well as choices among alternatives for action. However, through most of our history we have been a people whose interests and desires were directed more toward action than toward the life of the mind or feelings. We were naturally led to prime concern with life as action because we came to live on a rich and at first substantially unoccupied and unexploited continent. The growth of population, the extension of markets, and the increasing command which advancing science and technology gave us over our material and social environment all helped to give first place in our interests to venturing, contriving, doing.

This focus upon liberty as opportunity to choose among courses of action was reflected in certain main courses of growth in the law pertaining to liberty. This emphasis appears in public law (that is, law dealing with relations between individuals and the politically organized community). It appears here in the prime emphasis we put in the Bill of Rights upon protections for the defendant in a prosecution for crime (for example, by providing that no man shall be compelled to testify against himself); in the criminal law the state presents the most direct threat to limit, or perhaps even to take away altogether, the individual's enjoyment of a range of opportunities for action. This emphasis appears as well in private law (that is, law dealing in the first instance with relations among private individuals or groups). There it appears in the prime emphasis we put--especially in the nineteenth century--upon the law of private property in land and upon the law of private contract. Our law rejected feudal titles (and especially all feudal restraints upon the ready sale or transfer of land). Instead we declared that the normal type of title to land should be a title which gave the landowner the broadest range of choice as to what use he would make of the land, including freedom to sell it to anyone who paid his price. Similarly, in contract law we said that our public policy favored the greatest range of opportunity for men to choose their own privately agreed upon courses of action.

Therefore, we would presume that every private agreement was consistent with good social order and should be enforced in the courts. If anyone claimed that for some reason a contract was of a bad kind, harmful to good social order, and therefore should not be enforced, he must carry the burden of persuading the judges to refuse to enforce it, as a contract illegal as against public policy. This legal principle--that, ordinarily, a private agreement would be presumed to be lawful, until contrary reason was shown--is an important element in the ideal of "freedom of contract", which has figured much in controversies in this country over the proper scope of liberty.

Our legal tradition tells us that liberty must include freedom to think, to feel, and to communicate ideas, feeling, and knowledge. To this purpose spoke the "Act for establishing Religious Freedom", which Thomas Jefferson wrote and Virginia adopted in 1786. The First Amendment to the Federal Constitution broadened the area of protected freedom to include the life of mind and emotion concerning worldly as well as religious affairs, when it said that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Decisions of the United States Supreme Court in the second quarter of the twentieth century established that these values protected against federal invasion by the First Amendment were likewise protected against state invasion because they were essential elements of that "liberty" of which, said the Fourteenth Amendment, no state might deprive any person without due process of law.

There was further protection for men's freedom to think and to feel in a legal doctrine older than these declarations of the Virginia statute of 1786 or the Federal Constitution, which was usually treated as an element in the rights thus guarded. By the late eighteenth century both the common law (the judge-made law) and the statute law defining crimes in England and in North America had established as the normal rule that a crime consisted not of an evil intent alone, but of such an intent plus some overt act tending to translate the intent into tangible effect upon other persons. To commit burglary, a man must not only intend to burgle; he must also do some act--open a window, pry open a lock--to"break and enter" another's dwelling. To require proof of an overt act as part of what the government must show in order to convict a man of crime was to put a strict limit upon government's authority to punish men simply for thoughts or feelings.

To communicate ideas or emotion to others is, literally, an overt act. But the opportunity to communicate is so closely related to any real liberty to think and to feel about one's experience, that those who put high value upon liberty felt that mere communication or mere argument or persuasion should not be regarded as an "overt act" such as is ordinarily required to establish a crime. Rather, there should be broad freedom of communication. Our legislatures did not often seek to punish mere communication or advocacy, and if the language of a restrictive statute was of doubtful meaning, the Supreme Court of the United States would interpret it as not intended to punish mere belief, or discussion, and perhaps not mere advocacy. But, how far the requirement of an overt act beyond mere expression or advocacy would be treated as a constitutional limitation on legislative power to regulate communication remained a disputed issue. Speaking for a Supreme Court majority in 1919, Mr. Justice Holmes came close to making the overt act requirement a constitutional standard: "The question in every case [of legal regulation of speech] is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[1] But this "clear and present danger" test never thereafter became a broad, firm limitation upon legislative power. In 1951 the Supreme Court adopted as the best formula it could find the words of Judge Learned Hand: "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Insistence upon proof of an overt act still carried weight. It was felt to be important to protect liberty to think, feel, and express. Therefore, authority to limit even advocacy (let alone mere belief or mere discussion) must depend upon a responsible legislative judgment that there was a close relation in fact between forbidden expression and highly dangerous overt results. But, said the Supreme Court, "speech is not an absolute", for "nothing is more certain in modern society than the principle that there are no absolutes. . ."[2]

As we worked at creating a new social and legal order in the late eighteenth century, we regarded freedom for mind and spirit as key elements of liberty. But, if the late eighteenth century gave us important legacies concerning liberty in politics, religion, thought, and personal feeling, the nineteenth century turned its attention primarily to liberty in economic action. In the twentieth century the social upheaval caused by a great depression, and the strains of hot and cold war, abruptly plunged the people back into sharply felt need to think more of liberty in relation to men's ideas about their human worth, their social and political organization, their loyalties, hopes, and fears. We should recognize that we came to these modern challenges with less time-tested and action-tested ideas about liberty outside the area of economic behavior than one might think we had if he looked only at the calendar. In this perspective, we need to realize that the practical roots of the values we said we attached to liberty did not run very deep or very widely in our experience, that we could not rely in crisis upon a well-formed and dependable body of popular loyalty to all of these values, that we could not escape the need and the responsibility to give these values substance by our own hard choices and our own risk-taking in our own generation.

Freedom "From" and Freedom "To"

It is easy, but it is wrong, to think of liberty only as a human condition consisting of the absence of legal restraints. This is an easier way to think of liberty because the Bill of Rights seems to consist simply of prohibitions upon government and corresponding claims of individuals not to be subjected to certain kinds of treatment by government: A person shall not be deprived of life, liberty, or property without due process of law; he shall be secure against unreasonable searches and seizures; he shall not be held to answer for an infamous crime except upon grand jury indictment; he shall not be required to supply excessive bail, nor to suffer cruel and unusual punishment.

What is wrong is not that this idea of liberty does not point to some significant elements, but that it is incomplete. In the practical sense in which our society has treated the idea--as possession of a range of choices as to what to think, feel, or do--liberty may exist, and may be the greater, in proportion as we are free of some restraints. However, even when we look at liberty in this negative sense, we need to consider more than freedom from legal restraints.

Three other sources of restraint upon freedom require attention: (1) My range of choice in using a piece of land may be cut down if my neighbor is physically stronger than I, or is armed when I am not, so that he can run me off the land. When the law provides civil and criminal remedies against private violence upon my person or private taking or damage of my goods, it enlarges my liberty by relieving me of restraints which arbitrary private power could put upon my opportunities. So, too, the Sherman Act aims to make business free of certain limits imposed by private power, when it declares illegal "every contract, combination. . ., or conspiracy in restraint of trade or commerce among the several States."[3] (2) Restraint may come from within as well as from outside the person or group whose range of choice is in question. An individual is not free to make a choice if his ignorance bars him from recognizing that the choice exists, or if his lack of self control or experience prevent him from exercising the will to select. Law recognizes the reality of such inner limitations when it limits the legal capacity of minors to make contracts, and provides procedures by which a guardian may be named to look after the affairs of an infant or an insane person. Of course the immediate effect of law in these instances is not to enlarge liberty, but rather to limit the harmful results that might follow from the individual's own practical inability to exercise liberty. The significance of these instances--especially of the problems posed by the limits which ignorance or inexperience put upon the individual's ability--is that they point to affirmative as well as negative relations of law to liberty. Law may affect liberty not just by forbidding certain restraints on men's ability to make choices, but also by positive, constructive action to increase men's ability to choose. Public money spent on schools helps young people to grow up and acquire skills with which they can become responsible choice makers. Public money spent on hospitals, out-patient clinics, and preventive mental hygiene may help troubled individuals to keep or to regain their ability to make responsible decisions over their lives. (3) Restraint on freedom may come not from the personal attacks of other individuals or from the personal deficiencies of the individual actor himself, but from the general situation in which the individual finds himself. We are born into a physical and biological environment which we did not make, but which limits what we can choose to do. Physical separation (space) limits our ability to communicate and pool resources. Our biological make-up subjects us to limitations of disease and aging (time). We live in society with others (within a given culture), and must accommodate our movements to theirs; too many automobiles on too few highways at rush hour makes a traffic jam. In its negative aspects, law may enlarge practical liberty by regulating behavior to promote better adjustment to limitations of space, time and culture--our physical, or biological, or social situation. The health inspector is authorized to quarantine one who is sick with a contagious disease, so that he will not spread his germ through the crowd. The corner traffic light limits the choice of the individual motorist, in order that all motorists may move through the intersection faster and with less risk of collision. The same examples remind us that law is at work here on its more positive side, too. Public moneys pay the salary of the health inspector, and the costs of the traffic light. Reaching into deeper levels of cause and effect, public moneys appropriated to public universities or tax exemptions granted to private educational institutions may help promote research which studies disease and congestion in cities, so that preventive medicine and planned highway development may in the longer run reduce the amount of mutual human interference with which the health inspector or the traffic light have to deal.

Two propositions stand out, if we take this broader view of the ways in which law affects liberty. First: We do not solve all problems of limitations on liberty or threats to liberty by curbing abuses of government power or by insisting that there is some absolute virtue in limiting what government does. The history of public policy in this country shows that we have not been content to think that we achieve liberty simply by limiting government. We have recognized that what we want for individuals and groups is a broader range of practical opportunities to choose their ways of life. Therefore we have thought it good to use law to deal with the restraints put on individuals' freedom from any source--by private indifference, carelessness, or wrongdoing, or by individuals' own incapacities, or by limits set by nature or by social relationships. Second: Law has other means to affect life than by saying Thou Shalt or Thou Shalt Not. By the power to tax and spend public moneys, law can in some measure reconstruct the situations in which men find themselves, so as to enlarge their practical life opportunities--as, for example, through education, control and prevention of disease, better planning of arrangements of social living such as a more efficient street lay-out, to reduce traffic tie-ups. Of like effect are some legal regulations (like the traffic light), which impose limited restraints for the purpose of enlarging the total amount of opportunity. Thus the main lines of growth in public policy have reflected our belief that worthwhile freedom is not just freedom "from" restraints, but freedom "to" exercise more positive choice in our living.

Whose Liberty?

As a people we have treated liberty in practical terms as the enjoyment of a range of opportunity to make choices. Our experience tells us, also, however, that the achievement of liberty itself requires a good deal of difficult choosing. Opportunities of choice are not unlimited. So our law reflects the fact that we have had continually to decide who should have liberty to do what, and when, and how.

Let us continue to avoid the abstractions of philosophers or political pamphleteers, and stay close to those ideas and feelings that we find concretely reflected in law. Here we see evidence of two prime factors which require that liberty itself be created by continual making of hard choices.

(1) "Human nature" is one factor. We need not assume that there are any particular elements which are basic to "human nature" everywhere and at all times. More modestly, let us just take account of ways in which men have estimated their human possibilities and needs in our own society. In these terms, problems for liberty arise because we feel that life makes sense and has value only as a man is able to enjoy both a private and a sociable existence. This society learned to put high value on individuality. Liberty, therefore, meant opportunity for each one to be himself in his uniqueness or difference, and to make whatever special, creative response he could to what he experienced. In this sense we wanted each person to have liberty to lead a private life; there was no more important right for law to recognize and protect than the right of privacy. Thus, for example, property law protects men in making their own decisions as to how they use their own labor and land and goods, and constitutional guarantees say that the state may not take private property or regulate the use of it merely to satisfy someone's private interests or notions, but only to protect a public interest, or satisfy a public *need. On the other hand, from many sources* we learned to believe that men enlarged their lives by fruitful relations with each other. We learned so from our religious development, in communions of believers. We learned so from our economic growth through the market, involving exchange, bargained agreement, and division of labor. We learned so from our social experience on a rude, unopened continent where both our opportunities and our limited means invited us to multiply the variety and quantity of associated effort. We learned so out of political necessities, as the challenges of separating from England, setting up new states, and inventing a federal system taught us confidence in our ability to create large, new structures of power relationships. A people with these kinds of experience believed that liberty included and depended upon broad opportunities for private (non-official) association and private associated action, and for expression and fulfillment of common purposes through responsible, representative government. So, first the common law and then our constitutional law came to recognize that men should have a legal right to form private groups to pursue common purposes of their own choosing; the state might not punish them for acting in private groups, or require an official license before they might form a private organization, unless the legislature or a court made a responsible finding that there

was particular reason why the purposes or the means used endangered some tangible and important public good. Even where a special license was needed from the state, because the group wanted to enjoy rights or immunities which the general public did not have, the trend of public policy was to make such licenses generally available on generous terms; in this fashion from mid-nineteenth century on, we made it progressively simpler for men to form limited-liability business corporations, and to organize many types of nonprofit corporations for religious, educational, philanthropic, and social purposes. So, too, we steadily enlarge the right to vote, in part because we felt that the possibilities of using law to increase as well as protect freedom were such that all competent persons should have opportunity to help decide how this important form of associated effort should be employed. Thus liberty meant for us opportunity to feel and express not only the individual's unique qualities, but also to enlarge the content of life through communication and association. However, we cannot increase our liberty by associating or cooperating or reciprocating in thought, feeling, or action with others, and at the same time lead lives wholly separate and unique. The fact that we saw liberty as involving both privacy and sociability meant that our view of a desirable way of life insured that we must continually face up to choices in achieving such liberty, between claims of the individual apart from and in association with his fellows.

(2) Scarcity is the second factor which means that liberty--which we think of as the possession of opportunities to make choices--is itself made by continual, difficult exercise of choice. This is the reality back of the familiar caution that the price of liberty is eternal vigilance. Experience never offers us everything we would like, for the taking. We find always that both ourselves and our world (at least as we know our world at any given time and place) are limited, limiting our possibilities of satisfaction and achievement. (a) Some scarcity exists as brute fact, regardless of what we want. In a given situation, there is just so much water, minerals, timber, just so many able-bodied workers, and in a particular person just so much energy and competence. Some scarcity exists because of the state of our knowledge; this is a factor partly within our control, partly beyond it. Advance in knowledge may push back the limits of scarcity, but in any given time and place our ignorance sets boundaries to what we can choose to think, or feel, or do. Brute-fact scarcity restricts liberty by making us count costs: We can have a certain satisfaction only by having less or none of some other satisfaction. We can conveniently carry off factory wastes by dumping them in the river,

but only at the expense of killing the fish and making the water unfit for drinking; so we may increase the liberty of the factory operator at the cost of the liberty of fishermen and household water users. Some scarcity exists because of the state of our emotions. Two kinds of emotion-based scarcity pose specially important problems for liberty and for law. (b) One is fear. There is realistic fear of the aggressions or competing interestsof others. There is, also, fear which may start in some reality, but develops beyond reality, growing out of what is strange or unfamiliar in people or events, or growing out of nameless anxieties with roots deep in the growth of personality. Fear limits practical liberty. Out of fear men try to suppress what is strange or different, whatever creative possibilities the new or different may hold. Whether it be realistically based or whether it comes from sick anxiety, fear tends, also, to express itself in effort spent for negative rather than positive ends. Driven by fear, men seek to limit rather than to enlarge the other man's opportunities for choice, and--in practical effect, though not intentionally—the fearful man limits his own opportunities by spending his resources on defense or destruction. (c) The other emotion-based scarcity is indifference, or acceptance of familiar patterns of behavior--absence of motivation to think and feel freshly. Poverty of motivation reflects the imprisoning force of habit and the fact that men do not have unlimited stocks of imagination, will, and energy with which to cope with change and circumstance. Poverty of motivation shows itself in inertia in men's affairs. Practical liberty to choose among possible courses of ideas, feeling, or action is sharply limited where some cooperative effort, some mobilizing of resources, is called for, and where not enough of the people can be found to care enough to get the new current moving. Increase in knowledge is a lever with which we can move aside some limits set either by brute-fact scarcity or by emotion-based scarcity. This is a way in which knowledge is power. We may learn how to handle waste disposal so that factory owner, fishermen, and households all may use the river. We may learn to control and channel aggression so that men feel safer in trusting each other more, experience less anxiety toward the strange or the new. The fact that increase in knowledge may reduce barriers which scarcity puts upon opprtunity for choice should remind us again that we can create liberty not only by removing restraints but also by increasing men's positive capacities.

Liberty, thus, emerges practically from (1) adjustments between men's private and their social lives and (2) from preference of some persons' satisfactions over others' in situations where scarcity requires choice.

All liberty is the liberty of individual men and women. But (a) some of these adjustments and preferences create liberty for individuals to be let alone, and to develop as separate, distinctive sources of ideas, feelings, and action, and (b) some create liberty for individuals to share ideas and feelings and to act together. Liberty, that is, includes liberty to be oneself apart, and liberty, to be part of effective groups.

What is involved in the liberty to be oneself? Law protects the individual, first, as a being. However important the social interests in the name of which the state acts,--even when the state acts to guard itself against treason, or its people against murder--the state shall not deprive any person of "life" without due process of law. So, too, the law of crimes and of personal injuries declares that every individual is entitled to his life against intentional or heedless invasions by private force. But liberty to be oneself means more than existence. It means the opportunity to respond to experience according to one's own capacities of mind, emotion, and action: to think one's own thoughts, make his own valuations, decide for himself what job to seek, whom to marry, when to go to another town--as Louis Brandeis once put it, to have the right "to be let alone".[4] This is legal privacy. So, again, for whatever high purpose it claims to act, the state itself may not put a man in jail except by due process of law, may not make him a slave or assign him an arbitrarily determined class position in society, may not require him to join or support any church, generally may not punish him for thoughts or feeling but only for overt action harmful to others, may not prevent him from using his land or goods or from making such contracts as he chooses, unless a proper legal agency has decided on grounds that will stand rational examination that public (general) interest requires limiting some kinds of contracts or uses of goods or land. Analogous legal protections surround one's right "to be let alone" by private intruders. A man may speak or write what is in him to say, and another may have damages (for libel or slander) only if the speaking or writing is defamatory, and even defamatory matter is generally privileged if it tells truth. The law of trespass keeps others off my land unless I consent to their coming on it. The law will give me damages or an injunction where without cause a third person interferes with the performance of a contract I have made. The law enforces creditors' rights, but only within limits which respect some basic ability of the debtor to function as an independent actor in the economy. Thus the debtor may not contract himself into slavery to the creditor; constitutional provisions forbid imprisonment for debt; statutes exempt from the creditor's seizure the debtor's necessary household goods, the tools by which the debtor practices his trade, the family homestead, and some part of a worker's wages necessary for subsistence; in the last extremity, subject to safeguards against fraud on creditors a discharge in bankruptcy offers the distressed debtor the opportunity to wipe the slate clean and start afresh.

The liberty to be oneself--and its converse, the right to enjoy basic respect of one's individuality from others--are not conditioned by the requirement that one show that he uses his liberty creatively or constructively or energetically. These are liberties which attach to any person regardless of positive merit. The fact that they so attach involves some of the hardest choices we have to make to achieve liberty in the face of the tensions between man's private and his sociable capacities and in the face of real or felt scarcities in experience. The free speech which the Bill of Rights guarantees is used by stupid or hypocritical speakers as well as by intelligent and honest ones; though an accused is of bad reputation and stands charged with a repulsive offense which rouses our every fearful instinct to close ranks for social order, yet, to protect the basic dignity of everyone, the Constitution says that the accused may not be compelled to testify against himself, though in consequence he may go free; a man may waste land or goods on foolish speculations, or to produce trivial products, but nonetheless he enjoys the same rights as property owner or contractor as does the wise and fruitful operator. Looked at in this light, if someone asks, whose liberties are these, we must answer, they are everybody's.

However, we find our satisfactions in what we can do or share in relations with others, as well as in experience unique to each. We can fully realize freedom only in a decent society. So liberty includes regard for the condition of a good society. Therefore, both as against the state and as against private pressure, we have built into law protections and assistance for men's efforts to reach out to each other. The state is the association which concerns the widest number of persons; indeed, the state intimately affects all persons who live within its sovereignty. Whether in its policing activity or in its affirmative services (such as providing public education or public health facilities), the state is our most powerful instrument for mustering the means to increase as well as protect individual liberty, as it is also the most powerful means of denying liberty. Therefore, both to promote freedom and to safeguard it, all persons born within the state should have opportunity to have some effective say as to how government is set up and how it works; accordingly, we have broadened the right to vote, legitimized political parties, and by corrupt practices legislation declared our concern about the undue weight of money or secret influence in elections. Partly to balance the power of the state, but even more because we believed that there were no limits to the new opportunities of experience (that is, the new liberty) which men could contrive by pooling ideas and resources, we decided that there should be constitutionally protected rights of free private association. Such associations might range from the sharply focused relationship between two persons who make a business contract to more inclusive groups organized for common worship, common pursuit of charitable purposes, common advocacy of public causes or legislation. This liberty of association meant that men did not need to ask the consent of any public officer, or obtain a license from any public agency before they might lawfully join in some common enterprise, unless their common purposes required some privilege different from the rights enjoyed by other persons. Some special privileges--for example, that stockholders in an ordinary business corporation should not be liable for corporate debts, or that a profit-making or a non-profit-making organization should enjoy unlimited life despite changes in the roster of men and women interested in it--contributed so much to the effectiveness of types of private associations we wanted to encourage, that we made such privileges of incorporation available on easy terms under general statutes to any persons who wished to organize ordinary business, religious, philanthropic, or social groups.

Men form groups because they can gain satisfactions together which they cannot create alone. By the same token, men in groups can often compel or affect the lives of others in ways which they could not accomplish alone. Thus to promote liberty in association generates new possibilities of limiting the liberty of individuals in their separate and in their social being. We were sharply aware that there could be abuse of that most pervasive of forms of group power, the power of the state. So the Bill of Rights limited the ways in which government might use its power against individuals (as in forbidding forced confessions or unreasonable searches of private premises or unreasonable seizures of private papers) or against private associated action (as in denying officials the power to require disclosure of membership lists of private organizations not shown to be of a criminal character). More broadly, we relied on the separation of functions among the legislative, executive, and judicial branches of government and between the nation and the states to set bounds on the exercise of public authority. Likewise we were not prepared to allow power accumulated by private associations to develop without limit. Where private organization was used to provide facilities like railroads or electric power supply (public utilities) on which great numbers of the people and a wide range of other activities depended, the law required special licenses on special terms, and imposed continuing regulations lest these strategically located organizations arbitrarily restrict the liberty of those dependent on them. Where private economic association did not occupy so strategic a position relative to other activities, we relied on the market to furnish through competition safeguards against unlimited growth of concentrated power. Accordingly, with varying effect, we limited freedom of contract by laws against contracts or combinations in restraint of trade and against trade tactics (such as discriminatory pricing practices) by which large dealers sought to destroy competition by bringing to bear not their superior efficiency but their superior economic force. In such manner we sought to insure that the market would be a vital institution to keep economic association compatible with liberty.

Both with respect to government and private power, thus, we favored legal and social arrangements which broadly dispersed the making of decisions upon the use of resources brought together by organized effort. This emphasis upon dispersion of decision making was, we felt, basic to creating and maintaining liberty. This was the principle of constitutionalism. Constitutionalism means that all forms of organized power must be responsible, in the sense that there should be no major center of decision making whose activity is not subject to check according to criteria defined and enforced by some other center of decision making. We customarily use the words constitution or constitutional to refer only to the terms on which government holds legitimate power. But in our actual public policy we applied the constitutional ideal to private as well as public power.

Interplay between individual and social experience points to the fact that liberty became real only through broad dispersion of decision making among many individuals and groups. Hence, through federalism and the separation of powers, through favor to a wide scope for private association, through legal protection of a free market, through the protections which the courts afforded to individual grievances against arbitrary public or private power, we erected the dispersion of decision making into a principle of healthy social organization. We did not trust unchecked power anywhere. Liberty was the product of a balance of power. But liberty came from a balance of power which itself was the product of constantly shifting adjustments among many centers of action. This balance of power basis of liberty tended to generate two kinds of problems. First, the balance of power rested so largely on distrust that it was likely to produce more negative than positive decisions; there was hazard that the balance of power would eventuate in stalemate rather than in expansion of creative energy. Yet, as we have seen, there was always need of affirmative action to bring liberty into being. Second, as the scale of all economic operations increased in twentieth-century American society, more and more the balance of power was produced by the interaction of groups. More and more, individuals found that they had effective voice only as they were part of groups. A liberty which was maintained only by group action might well lose real substance for individuals. In the face of this tendency, the role of the courts promised to become even more critical for individual liberty. For it was the distinctive function and opportunity of the judicial process to provide a forum for individual grievance, and leverage for individual power.

The trends of our social growth made the relations among individuals and groups more and more important in determining the practical content of liberty. Thus it became important that the idea of constitutional (responsible) power should apply not only to relations among different centers of power, but also to relations within any given association, public or private. Applied within a group, the constitutional idea meant that both majorities and minorities have rights to certain kinds of respect from each other; both majority and minority have liberties. The idea that individuals or the minority members of a group should have some rights which the majority is bound to respect is, of course, a familiar part of the general idea of liberty. For example, in the affairs of government we set constitutional limits upon the power of the party in power to destroy its opposition by force. In addition to guarantees of free speech and press and freedom to organize political parties, we set certain basic rules of the game of politics; we narrowly defined the crime of treason, so that the party in power might not invoke that dread charge on no basis other than differences of policy, and we forbade test oaths, bills of attainder, and ex post facto laws, as devices which had been employed in the past to suppress political opposition. So, too, out of hard-bought experience our legilative bodies developed rules of procedure which included safeguards for the minority voice. For example, there is the rule that a two-thirds vote is customarily required in order to close debate. As a part of our general favor for freedom in private association, the law has been reluctant to intervene in the internal affairs of private groups. However, even here individual members and minorities have some legally enforceable claims to respect from the majority; a member may not be expelled except according to the regular procedures of the association; minority stockholders may sue in the name of their corporation and for its benefit, to recover losses caused by gross abuse of authority by the controlling element in the corporation. In addition to rights of individuals and minorities, however, we must not forget that majorities have rights, too. Both in government and in private associations the majority has the right to be free of disturbance or overthrow of the regular processes of the group by the force or fraud of individuals or minorities. Though it is carefully limited, there is a crime of treason, as well as the prohibitions which the law lays upon riot, unlawful assembly, or bribery as wrongful means by which an aggressive or unscrupulous minority may seek to disrupt legitimate processes for reaching group decisions and legitimate pursuit of the benefits of association. Though the rules of parliamentary procedure protect the liberty of the minority to have its say, they also include procedures to compel attendance of enough members to do business and to put an end to minority tactics of sheer obstruction. If we ask, again, who has liberty, we must answer, both majorities and minorities have liberties.

Life in our society created other--less dramatic but no less important--problems of liberty than issues of the balance of power among or within organizations. These were problems chiefly of real or felt scarcity. They grew mainly out of the character of the economy. Large-scale, mass production became the dominant type of economic activity. In many and often subtle ways such production shaped not only our conduct in the market place but also our attitudes, hopes, and fears in other aspects of living. This style of production depended upon increasingly large organizations of men and capital, and upon increasingly intricate division of labor. From this kind of social situation sprang two main kinds of problems of liberty: problems (1) of respect for individual dignity, and (2) of fair allocation of gains and costs of social interaction.

(1) Large organization and high division of labor required tighter discipline; there had to be more giving of orders and more rule making and more obedience to orders and rules, for such a system to work. Moreover, although such a system generated vastly greater

production than could be turned out by less specialized more self-contained work units, the individuals involved had less independence in resources. Workers became more dependent for livelihood and self-respect upon holding their positions in the organization; managers became more dependent upon reliable response from labor. The combination of increased discipline and dependence bred clashes both of objective interests and of fear of arbitrary imposition of power from one side or the other. Thus labor relations became, in the middle twentieth century, a major area of growth in legal regulation designed to promote and protect practical liberty. In recognition that meaningful individual liberty here depended on association, legislation protected the right of workers to form unions and to bargain collectively, not only over wages but over fair discipline on the job. In recognition that meaningful management liberty depended on peace and reliability of expectations, legislation provided procedures to determine with whom management must bargain collectively, and set limits to the tactics of pressure (such as the boycott) which unions might adopt. Of course the law here did not grow in response to abstract concern for liberty; labor law was the product in large part of the pull and haul of competing selfishness and fears, and reflected the compromises, accommodations, and failures which go with such a situation. Nonetheless, the intervention of legislation and executive and judicial action implementing legislation meant that neither management alone, nor labor alone, nor any combination of forces from the two sides dictated the outcome. These legal processes brought into play other interests and broader concerns for individuality in an effective social order. Modern labor law, over-all, thus was entitled to a place in the body of our liberties.

(2) An economy which made individuals more dependent on the actions and wills of others, and in which the increased size and organizational complexity of operations tended to spread in widening circles the effects of action and decisions, was an economy which required closer attention to questions of who got what benefits, and who bore what costs. At the same time, the greater complexity of such a society made it harder to trace cause and effect; screened by this complexity some persons could enjoy great increase of their own liberty at the cost of painful or at least unfair loss of liberty to others. As we became more aware of such issues, we got into lively controversies, for example, over the proper scope of "freedom of contract." As of, say, 1850, a worker was "free" to contract for employment on condition that he assumed all risks of personal injury on the job. But this was a theoretical freedom only, if he had no choice but to take the job on those terms or to go hungry. Moreover, if he took the job on

those terms, and was killed because of unsafe working conditions, the care of his widow or orphan fell upon public or private welfare facilities; thus the employer (or, at next remove, the customers who bought the employer's output) did not bear the full factual cost of the employee's involvement in the production of which he was part, but in effect passed over part of that cost to private charity or to the taxpayers who supported public welfare services. "Freedom to contract" thus might mean, in practice, a good deal more of practical liberty for the employer or his customers. But it might also mean painful reduction of the life opportunities of the worker's family. And it might load unfair burdens upon charitable givers or taxpayers who got no share of the greater freedom enjoyed by an employer or those who used the goods or services which the employer's operation produced. In the late nineteenth century, legislation put on employers greater responsibility to create and maintain safe working conditions; some statutes declared that the employee's alleged assumption of the risks of the job should not be a defense to a suit against the employer for injury on the job. Early in the twentieth century we decided that the principle of insurance offered a still more rational solution to these problems. Workmen's compensation acts provided for money awards not based on any showing of employer's fault but simply on the occurrence of injury on and growing out of the job; such liability put the employer under pressure to insure the risk of liability, and thus to include the insurance cost in his costs of production, and so to spread the item, like other costs, over his customers. Thus we sought by a more rational tracing of gains and costs of social interaction to enlarge or protect the practical liberty of more of the people.

Finally, we should note that as we talk about liberty as the liberty of individuals, groups, and majorities or minorities within groups, it is easy to fall into treating the matter as involving only our present life and ourselves and our contemporaries. But for both practical and moral reasons, when we ask, who has liberty, we should ask also whether the people who will come after us have proper claims upon us to consider their liberty. Holding to our practical definition of liberty--as the possession of a range of choice of ways of life--it is clear as a matter of fact that what we do now may enlarge or restrict the practical liberty of those who live after we are dead. The stocks of non-renewable natural resources, like oil, which we now use will not be there to be used by our descendants.

The learned traditions of emotional control and trust in rational procedures which are embodied in our notion of due process of law may be fatally broken beyond transmission to another generation, if we descend too far in our time into the fear which breeds destructive distrust and hatred. We may not, perhaps, "owe" something to the dead, for they are beyond benefit or hurt by what we do. But we can benefit or hurt our children and the unborn generations to come, by knowingly or carelessly making present choices which without good reason restrict or destroy the range of alternatives of choice for further growth. The mature living "owe" the immature living and the unborn generations the chance to grow, because it is in growth that life has human meaning. Yet, the matter is not simple; as always, we find that we cannot escape making choices, in order to create liberty. We who are now alive can choose only on the limited knowledge and emotional capacity we now have, and we cannot with certainty predict the future, if only because man's capacity for growth (his capacity for liberty) itself makes his future uncertain by adding new elements to his situation. Thus we the living are entitled to assert our liberty against the claims of a purely speculative future. "The Creator has made the earth for the living, not the dead", Thomas Jefferson told us.[5] No less it is true--especially because science and technology show no limits to the potential growth of knowledge--that we are not bound to hoard all we now have for a future which is likely to find it no longer needs the hoarded items. We are morally entitled to discount possible future liberty in the light of the uncertainties as to what the future will be like, and thus to seek our own liberty. But, within the best knowledge and emotional self discipline we possess, if we respect the general human value of liberty we must not act so as unreasonably to destroy or limit the capacity of those who come after us to adapt to changed circumstances or to choose new lines of growth. This is the concern for liberty we express negatively in laws forbidding waste of natural resources, and positively in the taxes we lay on our present means to improve the educational system we offer our children and our children's children.

Is Liberty an End in Itself?

Because liberty involves values about which men feel deeply in our society, they find it easy to talk about particular aspects of liberty as absolute, unqualified rights. If we look at the subject from the point of view from which our law has in practice treated liberty, and the point of view taken in this essay--that liberty means the ability in fact (fostered and protected by law) to enjoy a broad range of choice of ideas, feelings, and action--it should be plain that liberty is not absolute. Liberty is made up of particular liberties. Every particular liberty is at some point qualified or limited by other particular liberties. In law the individual does not even have an unqualified right to his life; the most that our most solemn legal declaration says is that the state shall not deprive a person of life "without due process of law".

Of course one may say that a man has an absolute right to a particular liberty within the (limiting) definition which law gives to that liberty. The Bill of Rights says that no man may be compelled to testify against himself so as to incriminate himself. But he may be compelled to give testimony, if a statute absolves him from any criminal penalty on account of that testimony. We could say that he has an absolute right not to be compelled to testify against himself unless the law thus far relieves him of criminal penalties. But it seems more playing on words than describing reality to say that, therefore, there is an "absolute" privilege against self incrimination. Precisely what the individual's liberty is in this respect is obviously the product of an adjustment of his liberty to the liberty of his fellows to enjoy a peaceful, orderly social existence.

To say that no particular liberty is an absolute is not to say that we treat all liberties as equally important or equally subject to restriction. We rank some liberties higher than others. Thus we regard peace and good order as important to the liberty of all of us. So we create a penal code against those who would encroach on the freedom of the generality of people who want to lead lives free of violence and fraud. But we regard the free movement of each individual as more important than this generalized freedom, to the extent that we put a heavy burden of proof on the state to establish that a particular accused committed a crime. Further, we surround the accused with various protections to his defense. Thus, for the sake of individual liberty, we take the risk to all peaceable people that these protections may let a guilty man go. On the other hand, though we favor freedom of private contract, we recognize that contracting parties are by definition concerned primarily if not wholly about their specific interests. Accordingly, we recognize legislative authority to regulate or even prohibit the making of contracts which may be deemed unreasonably to infringe the liberty of others. The courts express this higher priority put upon protection of the liberty of the rest of us by saying that a statute regulating rights of contract will be presumed to be constitutional; one who attacks the validity of such a statute must sustain a heavy burden of proof, to show that the legislature could have had no reasonable basis for passing it.

Freedom, thus, is the product of a great deal of taxing adjustment of competing claims. Liberty is made only out of the difficult exercise of liberty--out of continual, wise, emotionally disciplined exercise of what Mr. Justice Holmes called "the sovereign prerogative of choice".[6]

From the choices by which we have given substantial meaning to liberty emerge some basic propositions. In application, these propositions are not always consistent. Nor can one be dogmatically sure how much popular support could be mustered in support of each of them. If we are neither dogmatic or naive, however, we may profitably list some key positions:

1. All public or private power over men's wills or minds or feelings should be legitimate. Legitimacy means that the power should be acquired by proper means and used for proper purposes. Legitimacy should be measured under criteria not determined solely (though they may be determined in the first instance) by the power holders. Rather, legitimacy must be determined ultimately by legal processes which are themselves held responsible by demands of individual conscience and by private group opinion and organization.

2. Corollary to "1" are rights of privacy or self-determination: (1) As against government: Public power may properly be used only for public purposes; the law may not interfere with private individuals or groups unless for some reasonably determined public interest. (2) As against private power: Individuals and private groups should be protected by law in choosing their actions, ideas, and feelings, free of private violence, or fraud, and free of privately created economic or social duress imposed for other purposes than achieving the peaceful liberty of the actors.

3. For a satisfying individuality and a vital society, men should be encouraged to exercise creative initiative of will. This calls both for affirmative and negative uses of law. (1) Affirmatively, it is proper to use the public authority to tax and spend, and the authority to create useful social institutions, to provide education, to promote good health, to prevent disorder, and otherwise to help create social conditions which foster creative release of human capacities. (2) Negatively: (a) With reference to government action: Wise policy will regard as exceptional--calling for special justification--any requirement of a government license as prerequisite to private individual or group action. (b) With reference to private reaction to private activity: The presumption favors the exercise of

private individual or group initiative of action; hence in the law of contract, property, and tort the burden of proof rests on one who complains of the private action of others, to establish ground for the law's intervention or redress.

4. Though important to liberty, social order is not an end in itself. For society is not an end in itself, but should exist in such character as to foster desirable individuality. Hence we take risks with social order by holding generally that (1) men should be free to think, feel, and communicate without legal penalty save for socially harmful overt acts, and (2) men should be free to form private associations of their own design, for their own chosen ends, subject to penalty only for overt acts, or, exceptionally, for deliberate conspiracy against good social order.

5. A broad dispersion of decision making power is conducive to creating and maintaining a society in which men may enjoy liberty. Law should favor diversity and difference in ideas, feeling, and action, among individuals and among private associations, as the law embodies diversity in its own separation of powers among legislative, executive, and judicial officers, and between the national government and the states.

6. Recognizing that the practical content of liberty is made at least as much by what men do in concrete situations as by what they declare as their general values, and that the character of individuals, groups, and the state is shaped by the means they use as well as by the ends they seek, we should use rational and decent procedures in determining and applying policy. (1) Thus in determining basic public policy, we have insisted on the primary of legislative power, in order that decisions of broadest import be taken only through deliberation of an elected, representative body. (2) In applying public policy in particular situations, we ask that official action have rational relation to established general policy, be based on properly collected and presented evidence, and in some effective measure be subject to challenge and review in administrative or judicial tribunals.

Notes

1. Schenck v. United States, 249 U.S. 47, 52 (1919).

2. Dennis v. United States, 341 U.S. 494, 508, 510 (1951). The quoted formula from Judge Learned Hand will be found in the same case, 183 Fed. (2d) 201, 212 (C.C.A. 2d. 1950).

3. 26 Statutes at Large 209 (1890).

4. Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, Harvard Law Review, 4:193 (1890).

5. Letter from Thomas Jefferson to Major John Cartwright, June 5, 1824, in The Complete Jefferson (Padover ed. 1943), 296.

6. Oliver Wendell Holmes, Jr., Law in Science and Science in Law, Harvard Law Review, 12:443, 461 (1899).

b. AUTHOR'S INTENT

Professor Hurst

This paper aims to give the intelligent high school teacher a wide definition of the terrain one moves through in teaching something about liberty. Its analytical approach primarily undertakes to sensitize the teacher and through the teacher, the student. We are dealing here with matters which are intrinsically complicated in the sense that there are many interlocks of tension and wants and desires.

My deliberate choice and emphasis is on the institutions of property and the market as part of civil liberty. Any tendency to identify the Bill of Rights exclusively with a more emotionally based human claim is a mistake. Historically, the case will be demonstrated that the existence of a more or less independent market and the existence of private property have been, in our history to date, extremely important constituents of civil liberties as a living reality in people's lives.

Also, the paper deliberately undertakes to talk in institutional terms in criticism of the position that pursues a kind of "Devil Theory of Human Behavior." This view stresses those cases coming out of the Bill of Rights where particular human beings are trying to do something bad to other particular human beings. This should not be the exclusive emphasis of an approach to the Bill of Rights. There is an aspect to the Bill of Rights problem which I can only characterize as pertaining to original sin. I think all of us by virtue of the fact of our being members of a growing society, automatically, are guilty of all sorts of injustice to other members of the society. A certain amount of injustice is a part of the overhead cost of a society. Some of the most difficult and real problems in the Bill of Rights involves coming to terms with situations where there is no personal devil but where people are victims of an impersonal and faceless system of social organization. That emphasis is in the paper.

c. LIBERTY DISCUSSION HIGH POINTS

Professor Rogow (Appointed Commentator)

This is a good paper which hits seven major points. The first is on the meaning of liberty in general. Here his emphasis is on the freedom of choice. He adds to this freedom to think, freedom to feel, freedom to communicate, freedom to worship and so on, but then again he goes back to this notion of freedom of choice. I take it that if he was pinned to the wall and asked to offer one major concept of liberty, it would be in terms of freedom of choice.

He then goes on to a second division which might be called restraints on liberty. Again, this has to do a great deal with restraints on freedom of choice. There is, in the first place, violence outside the law, when someone interferes with your choices or your preferences. A second category he calls personal limitations. I understand him to mean those instances when people can not really make a free choice because of ignorance, because they are neurotic or for some other reason, It follows in this sense that freedom of choice involves a certain rationality. A third area of restraint on liberty is environmental limitation, by which he simply refers to the nature of the world, aging, disease, urbanization, increasing traffic and so on.

Another point emphasizes that all threats to liberty do not come from government. Perhaps Americans exaggerate the extent to which government is the enemy.

Fourth, goes back again to choice. I think what he is saying is that it is not easy for an individual to have liberty nor to enjoy it. He may be blocked, in a sense, by his nature or by the desires of others People prefer different things. What one man chooses, another may abominate. He may be blocked by scarcity. His choice may be limited simply by the fact we can not have all we want. He may be blocked by fear; he may be blocked by indifference or apathy by a preference for things as they are, by simple inability and unwillingness to take to something that is new and different.

A fifth point is that liberty requires an adjustment between private preferences and social choices or between private lives and social lives.

Sixth, a major emphasis is that liberty includes the right to be oneself: the right to evolve to one's potential; the right to self expression in the truest sense; the right to true individuality, not the usual conventional economic kind of individualism, but the right to simply be one-self short of, perhaps, hurting someone else: the right perhaps to find oneself, to find out who one is so one can express himself.

Seventh, and finally, the emphasis of the paper is that the basic condition of freedom and of liberty is what Professor Hurst refers to as a decent and good society. By this, I gather, he means the good society includes the following: Self-government, the right to participate, the right to vote, the right to turn the rascals out, and so on. It includes the right of association. It includes limitations on power, both public and private, and the notion that power is responsible, both public and private. It includes majority rule but with respect for minority rights. From this point he goes to the so-called basic propositions toward the end of the paper.

There is one basic question raised not just by this paper but by this whole conference and in fact by the organization which co-sponsors the conference. Professor Hurst raises it, perhaps, obliquely. "Do we want teachers to take a position and if so, what position do we want them to take?" In other words, are we willing to go so far as to say "Look, this is what is required for liberty, justice and equality: These are the changes we need in this country: This is what the law should do about it: This is how the economy should be altered, and so on", or alternatively, do we let them fill in these gaps in this whole area? Do we rely on the teachers to translate all these general principles that we are articulating here into concrete terms for the students? Professor Hurst said this was aimed at the intelligent teacher. Is that to be underlined, intelligent? Is that a qualification of significance? One of the questions we have to face up to here is that the Bill of Rights can be taught from all kinds of points of view. For example, what is a decent society? Without a decent society, you cannot have liberty, you cannot have a lot of other things. But does it include a basic living standard, for example? Does it include the absence of war? These questions are not answered by Professor Hurst and we do not know what he means by a decent society. I do know that some people would say, "Well, a decent society is one where income tax was abolished or lowered, at any rate." Some people would say a decent society is one which goes back to true and tried constitutional principles, including separate but equal, etc. And some would say a decent society would involve nationalization of heavy industry, extended public housing, medicare, and so on. I am not taking a position on this because I have my own feelings and so do you. I am simply saying, "Do we define a decent society or do we leave this up to the teacher, and if so, how can we be sure that this teacher who is the target of Professor Hurst's paper, and all the papers in a sense, will come up with the definition we would like him or her to have."

Now another question. "All power," Professor Hurst says, "Should be made legitimate." 'How'. Again, is this something we leave to the teacher's imagination or the preferences of a local community or the prejudices of the school board and superintendent and principal or what do we do with this question? A Conservative, for example, would define this power legitimacy as probably involving mainly the unions. They would talk about irresponsible union power. Others would refer to the power of corporations. Some would say that it is the industrial-military complex. But what is meant by legitimate and how do you make power legitimate? The question before us is "How do you define this?" Without definition you are left with a kind of general platitude to which all Americans subscribe readily. Another point, Professor Hurst says that a broader dispersion of decision making power is necessary. Granted. But, again, definition is required. Most people would conclude that this is government you are talking about, the Federal Government particularly, that there is too much power in Washington, that the Supreme Court has too much power. Do you want to include here the corporations, for example? Do you want to include private groups, the AMA, the ABA? How do you get a broad dispersion of decision-making power? Do you intend for the teacher to answer that without any help or assistance from us?

A certain kind of specificity is missing. What are the economic and social and psychological conditions that nourish liberty? Their importance is implied. What about the problem of liberty in large-scale organizations in general? This is hinted at, skirted about but not discussed. What about the organization man, what about the great pressures operating on everybody, including those of us in universities, to conform, to keep your mouth shut, not to stick your neck out, to play it safe, and so on? What do we do about that kind of liberty, how do we get it, how do we keep it, how do we preserve it? I am trying to emphasize that what we need or what we want to consider as necessary here is whether we want to fill in some of these definitions and concepts for the teacher or whether we want to simply hope that they will come up with the kind of answers and the kind of orientations that we would emphasize. What does it mean to say that man should be encouraged to exercise creative initiative of will? How does he do this? By whom is this encouragement to be provided? Government? The schools? Private groups? Or this seminar here? What in fact is creative initiative of will? All this adds up to the final question, "Does the average teacher know what all these references mean?"

Mr. Brown (Appointed Commentator)

This paper expressed and is organized in terms of what people have wanted and striven for in American society. This appeals to me because it comes close to the ultimate touchstone of the values of liberty and freedom and what they have meant to particular people at particular times. It is obviously not cut in terms of the Bill of Rights or anything of particular relevance to the purpose of this meeting, although it touches on it at many different points in many different ways. This poses a rather important policy question for this seminar. Professor Hurst took the whole concept of liberty and freedom, both actually realized and that which we might wish could be realized. Some are protected by the Bill of Rights, but a small part only. He considers the things that emerge out of the Constitution, the balance of power, separation of functions, the Federal system and includes common law, statutory law, the rights of labor under statutory law, intended protections and some unintended statutory law creations such as dispersion of decision making through creation of corporations and limited liability. These have other purposes but the effect is of dispersing decision making. He goes even beyond to something which is law, in a sense, but is basically government expenditure, that is, the use of money by government in a positive way to try and attain some of the things that the ideal concept of liberty would say was desirable, like education.

He goes even beyond to certain things that have sanction only in statements of moral principle. These would have a greater or lesser degree of assent throughout our society. This has been the subject of considerable discussion here. How wide the assent would be? What you do with these things? Do you tell the teachers these have the sanction of anything or do you let them handle them on their own?

Professor Hurst

I do not disagree with Professor Rogow. Partly the difficulties are simply inadequacies of my expression. No one should set up a catechism of a decent society. In mitigation, I think it is stated in the paper, but stated without enough emphasis obviously, that this is a discussion of the decent society and of liberty in relation to it. Some sort of an acceptable consensus has been reflected in matters which came to formal legal decision through statutes, constitutions and court decisions. From an anthropologists's or sociologist's point of view, the body of formal legal materials has been used as evidence as to the prevailing values of a society, but only those values which get reflection in formal legal materials. That is the proper limitation of our enterprise. It ought to be stated more sharply in the paper.

What is a decent society? What is legitimacy? These are essentially to be answered for the purpose of this paper with reference to the phenomena of organized power in the society. By power I mean the possession through organized means of ability of some men to exercise compulsion over other men's wills. Holding very sharply to the phenomena of organized power, helps from straying into highly debatable issues of human values.

There is more solid content in what the legal materials reflect than Professor Rogow thinks. For example, he said everybody believes in dispersion of decision making. Not everybody sees this. The typical high school teacher could find a concept of dispersion of decision making power in the society as novel, as the third year law students with whom I talk. As to whether everyone is in favor of it, I think this is a question of fact. I think there is considerable division in the society as manifest in the continuing controversy over the antitrust laws. In the field of loyalty oaths and security checks there is a disquieting amount of disfavor for dispersion of decision making in prevailing uncritical popular opinion. Dispersion of decision making is a concept actually in considerable controversy in the society and the liberty theme is important to it.

Finally, in defining the scope of the subject matter, we are dealing here basically with law. That is our Bill of Rights focus. I would defend the hypothesis that law is, in a sense, formal. The law deals with form and not substance. The law deals basically with the ways in which you come to the decisions, not with the content of the decisions. There are some exceptions to this, but on the whole this is true. This means that legitimacy, for example, is not to be defined from a lawyer's point of view, in terms of a catalog of substantive value choices which are legitimate, but in terms of the existence of the general acceptance in the society of certain ways of coming to decisions. This is the peculiar aspect which is legal in the matter.

Professor Emerson

I want to address myself to the issues which Professor Rogow raised very cogently in very basic questions to this group. First, what we are essentially dealing with in the Bill of Rights are what might be called the mechanisms of the Democratic process. These are the means by which the goals and values of the fundamental structure of a Democratic society are achieved. The results, therefore, which our society reaches are not of direct or immediate concern. We are concerned with establishing the framework. It is our faith that it will produce results which will achieve values we seek. Now I realize that there is more involved. Obviously you can not separate the means from the ends completely. In a general way, however, the specific materials we are going to deal with will relate to the mechanisms of the process rather than to the results.

Secondly, we should not attempt to establish any program under which the teachers would necessarily give answers to any questions. We would try to start from a basic consensus as to what the broad values are. Professor Hurst's paper makes a very good presentation of that. The consensus exists, it is true, at a fairly high and abstract level. Nevertheless there is a certain amount of consensus with respect to these basic concepts.

As they get applied in particular situations, they ramify into all sorts of problems on which there is no consensus. We could not formulate one here nor could we force one on the teachers. The question will remain open and that is the most that we can expect to accomplish. We are raising questions and having people consider them. That is worthwhile even if the answers that come out are not ones with which we would agree. It is better than what is happening now when these assumptions are not brought into focus and all that happens is a quiet acceptance of assumptions which people do not think through.

This emphasizes again that what we are doing must be anchored to the Constitutional protections. Unless we start at that point and enter through that point, I do not think we will be able to deal at all with the kind of problem that Professor Rogow raised.

Professor Hurst's paper states very well the basic framework from which we start on this problem. At a later stage the popularizers can make it intelligible to high school students. There are certain basic points which can be carried further. There is a further consensus with respect to the values and the reasons underlying freedom of expression which might be worthwhile expanding. But it is an excellent statement as it stands.

Professor Cross (Appointed Commentator)

This paper offers little backing for the sources of normative power and the roots of compelling interest that make us accept these principles. Certain declarations of ethical principle which are there are not necessarily universal. Also, I wonder to what extent Professor Hurst is arguing from the American experience, or from the philosophical or political premises of our system, or from ethical principles.

If this be used, primarily as guidance to thinking about a course in history or civics, there is available the usual historian's escape. This is to start by suggesting how the Bill of Rights got to be the way it was. Then you suggest religious notions we inherited from our religious traditions about the importance of freedom and of liberty, the concomitant of certain philosophical currents in the late 18th century about the nature of man's progress in society with which we may or may not agree. Then suggest the particular circumstances which led to the development of the Bill of Rights in just that form. You could then suggest the Bill of Rights was set up, not necessarily as a function of absolute human nature or of ethical precept, but as a historical result of all these things. Then move to the remainder of Professor Hurst's paper, which says how this has been worked out in a variety of fields as an experiment with many kinds of consequences.

Judge Hastie

We are talking about the Bill of Rights. We are rooted in that. We keep within a workable framework if our subject matter is directly concerned with the Bill of Rights. I suggest that, regardless of the level, the teaching subject matter be focused upon freedom of expression and nothing else.

Professor Hurst

A strong case can be made that freedom of expression can only exist in a society which has a free economic market. Therefore, the school should be concerned with the social significance of the market as a workable institution. In this framework it is actually a building block for considering free expression.

Professor Simon

I do not think freedom of expression is impossible under a socialistic system. I agree with Judge Hastie entirely about a question of priority. If we use Professor Hurst's approach for students, we are going to find out that students suddenly have the notion that the principal idea of liberty is to protect the market. This would be very dangerous. Priority is overwhelmingly necessary for student understanding that liberty belongs with free expression and what free expression means. This market thesis, in priority, comes at the last.

Professor Pritchett

This paper offers a good foundation for a somewhat more sophisticated understanding of the problem of liberty than most students or their parents are likely to have. The stress on the economic arrangements is an extremely important part of the whole non-negative conception of liberty.

Professor O'Neil

Are we moving toward the position where, though we have no paper on it, we should set aside a category called the right to own property and contract? It does not fit within equality, liberty, or justice, though it borders on and feeds into all three.

Professor McCloskey

I do not agree that you can read economic liberty out of the definition of liberty quite as easily as some writers do. There is no adequate rationale for doing so. Surely if we were talking about the Bill of Rights twenty-five years ago it would have seemed inconceivable to omit it. The fact remains that a lot of people in our society still do profess a concern for economic liberty as a value, that there is a conflict of opinion in our community on this question, and therefore it is still worth talking about whether one resolves it as Professor Emerson would or Professor Hurst implied that he might.

Professor Simon

Professor Hurst explained his position further to Professor Emerson and me privately, which modified my own. He is frightened that we might end up with some pretty cynical students if we did not explore this economic liberty division. We generally agreed the major emphasis and major priority should be on freedom of expression. However, this more sophisticated economic liberty concept should come at the end as necessary in understanding freedom.

Professor Emerson

I was horrified when Professor Hurst proposed as specific problems to consider in terms of liberty, freedom from stream pollution and the spending power. This was far removed from confining ourselves to the Bill of Rights and the Constitutional interpretation of it. I was also horrified that one would consider discussing liberty without freedom of expression which seems to me the heart of the problem we're concerned with here.

But I would not necessarily exclude concepts of property rights from the area. They come in at many points; in most cases as one of conflicting values, as freedom of expression and the question of protection of property rights, or in terms of equality and the property right to conduct a business the way you want. It would deserve attention if we went back to old-fashioned substantive due process, which is of no concern in this program except perhaps from a historical point of view. I wonder what Professor McCloskey has in mind when he talks about something on economic liberty.

Professor O'Neil

In order to join issue with Professor McCloskey, in response to Professor Emerson's statement, there is a real and fairly concrete point of dividion here. I now make a specific proposal* which I think embodies Judge Hastie's view and perhaps Professor Emerson's, too. This is that we add a fourth and quite distinct category along the lines of Number 4 on Professor Dorsey's material** which would deal separately with property and contract and economic rights under due process as distinct property questions, distinct contractual questions.

Professor Dorsey

The term, security, would diverge from my concern in the category of property and contract rights. We are faced now with a re-examination of our assumptions. We began with the assumption that individual decision making basically would result in allocation of resources. This would permit our structure of producing and distributing to result from the accumulation of individual decisions of property owners. A more sophisticated treatment is now required to consider the effect on this basic assumption of the concentration of power resulting from industrialization and advanced method of production. To what extent have or would we modify that original premise as reflected in all of the accumulated regulations of business and the other aspects of statutory and administrative law? We should come to realize our own minds with respect to the questions: What is our premise about how decision making should be made; to what extent should it be decentralized; to what extent, if it is too greatly centralized, in private hands, should it be taken over by representative decision making through institutions of government?

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* At conclusion of Liberty Discussion, motion failed.

** See page 55.

Professor Rogow

The dilemma that I was trying to articulate in my earlier criticisms is now clearer. Liberty or the Bill of Rights or freedom is not contingent upon a particular economic system. I take it that Professor Hurst's view is that freedom of discussion or perhaps a lot of freedoms are incompatible with socialism. I do not believe that and I would take a dim view of any teachers who taught this. There is lurking in this assumption of Professor Hurst's, and perhaps in his paper too, a belief (all too typically American) that whatever the government gains in power, the people somehow lose. I think most Americans tend to believe this. But one can imagine a vast increase of government power over the economy which would result not in a loss of rights or liberty by the people but a gain. One can even argue that democratization of power and decision making might be enhanced, might be advanced if the government was more active rather than less active in terms of regulation, control and perhaps even ownership of property. I would, therefore, take exception to any definition of liberty which suggested that it was somehow incompatible with, for example, a vast extension of government ownership.

Professor Hurst

I cannot refrain from expressing my bewilderment as to why these learned gentlemen do not see that economic security is a part of personal liberty. I think the flight engineers and the airlines would have found this a little hard to understand. And I think the reason we are on the verge of a railroad strike is because of that very acute issue of property in jobs which is regarded by workers as part of their very personal liberty. It seems to me that these issues are not on the shelf of history; they change their character but they continue to be alive.

Now a short statement on liberty is required because it is the really distinguishing feature between our kind of society and a totalitarian society basically in this insistance that public power is not self justified. The men who wield public power in this society are always put to the necessity of exercising it responsibly. This is what you mean by Constitutional government. That seems to me what the fifth amendment stands for.

Professor Rogow

I am objecting less to Professor Hurst's views here than how these views might be construed. A crude, but a popular translation of what he said that Democracy and free enterprise are dependent on each other and where one goes the other goes, too. This is the way I think this will be read or understood or taught.

Mr. Brown

At this point we should not confine ourselves under the concept of liberty to freedom of expression without knowing what the alternatives are that present themselves to thoughtful scholars as potential case studies, law related and with historical depth. The development of these alternatives is the future work of scholars and seminars. Without specific material to focus on, it is very hard to decide among these concepts or give a priority.

Judge Hastie

I am already strongly convinced, and do not believe that any development of material in other areas would change my conviction, that freedom of expression for various reasons is so predominantly important and so immediately related to Bill of Rights teaching, narrowly conceived, that I would be ready to say now that that should be Number I in working up an area.

Judge Frantz

I thought that we were going to make suggestions in a priority form of a number of phases that will fit into this concept of liberty. Then it is up to the teacher and the student. We have to think of the teacher and what is teachable and what the child can accept, and let them determine from our suggestions which one is the best one to teach.

Dean Pye

If we are going to talk about each of these subjects in the sense of law relatedness, historical depth and case study, if we can develop one priority in each category without in any way delimiting the possibility that other priorities will exist and will be developed at some later conference, we would have achieved a great deal. It would seem to me that if we can reach the conclusion that freedom of expression should have priority over economic liberty and adopt that, this does not mean in any way that we are foreclosing from our ultimate result any utilization of the concept of economic liberty.

I have a difficulty in conceiving it as an independent subdivision unless we want to go back and talk about freedom of contract in the 1920's. At the same time it may be extremely meaningful, when we get to the next stage, after we develop the concepts of liberty, equality and justice, perhaps in a highly conceptualized form, and perhaps from many points of view expressed in small publications, to talk about our concepts where there is conflict among some of them. Professor Dorsey's treatment that the concept of property or, in Professor Hurst's sense, economic liberty, when it comes in conflict with some of these other rights, is the best methodology of getting it across. Similarly our chairman suggested earlier, that when we talk about the right to a fair trial it will be quite meaningless for teaching unless it is presented in conflict with the liberty of the freedom of the press. It seems to me we are gaining something if we talk in terms of priority at this stage.

d. CONSENSUS STATEMENT ON LIBERTY UNDER LAW

A free society is one in which the individual has the liberty to feel, to believe, to think, to speak and to act within a wide range of effective alternatives or choices. For the individual, liberty makes possible an environment for personal growth and self-fulfillment. For society liberty offers the avenues to political, social and cultural progress, as well as to the greatest variety of answers to the continuing challenges of community life. The struggle to achieve liberty has characterized the long history of man's quest for dignity and integrity of person.

To perpetrate the ideal of liberty the Bill of Rights was incorporated into our constitution. It is the First Amendment which most clearly delineates the meaning of liberty as the guarantee of freedom of speech, press, religion, petition, and assembly. These five constitutional guarantees cannot be taken for granted; to be preserved, they must be respected and reaffirmed by each generation. Our schools play a crucial role in the transmission of this precious heritage. An effective program of instruction in the First Amendment, as well as in the other provisions in the Bill of Rights, will contribute to that understanding and sense of responsibility which are the prerequisites for liberty under law.

Effective freedom of expression confronts heavy odds. It will exist, insofar as it does, despite strong counter pressures of fear, interest, and indifference. Thus free expression is unlikely to exist unless it has a fostering context in other liberties promoted by law. In United States experience three other elements in the broader context of liberty under law have helped create a social environment favorable to freedom of expression:

(1) We have used law, both through regulation and by positive structuring of social relations, to attain more rational and just allocations of the gains and costs of social living -- as for example, through the workmen's compensation system, or programs of public education. Freedom of expression finds readier support in such a social climate when the legal order thus cultivates rational self-discipline among the people through the general search for reasonable and just ap-

portionment of rights and duties, and the enlargement of life opportunities.
(2) We have believed that law should protect men in access to opportunities for earning a living and seeking profit in market. Though our constitutional tradition forbids that the market be allowed to function as a wholly self-determining institution of social order, we have shown our belief also that a desirable balance of power is promoted when men have a substantial economic base independent of the favor or license of government.
(3) Also in part to promote a broad dispersion of power, as well as to invigorate the society's capacity for creative action, we have believed that men should enjoy under law a large scope of initiative to form private association for economic and social, as well as economic objections of their own determining. As a corollary, we have held that official license should not ordinarily be required as prerequisite to the lawful formation of private associations, but rather that the burden of proof should rest on those who assert grounds for requiring government's permission for the creation of private organizations.

Effective teaching of the First Amendment, as well as the other provisions of the Bill of Rights, can take place at a number of points in the social studies curriculum: American History, CCivics, Government, and Problems of Democracy. Instruction in this subject should be started as early as possible in the Elementary School, since it is reasonable to infer from recent research that attitude formation starts and becomes crystallized at an early age.

One of the most effective ways to teach the subject of liberty is through the utilization of carefully chosen case studies supported by the insight of history and the other social sciences relevant to the issues at stake. The value of the case method technique is that it personalizes and dramatizes issues; it requires critical study and weighing of value conflicts (the majority against the minority - the individual against the state); and it clarifies the nature of the judicial process in decision-making. Intelligent use of this technique leads inevitably to the analysis of the great equations of liberty and license, liberty and law, (the right of artistic expression versus public objection to obscenity), liberty and justice (freedom of the press versus fair trial), and liberty and equality (insistence by minority groups that a library remove literature offensive to them).

Since liberty involves the freedom to exercise a wide range of choices, government and the citizenry both play vital roles in effectuating and perpetuating this ideal. The First and Fourteenth Amendments embody restraints of governmental interference with freedom of speech, press, religion, petition and assembly. The catalogue of these restraints does not, however, exhaust the Constitution's guarantees of liberty. Equally important, government may in certain circumstances incur affirmative obligations to ensure a wide choice of opportunities which might be denied or foreclosed by governmental inactivity (for example, police protection of an unpopular speaker). The best guarantee of the preservation of liberty is the development of an educational program and a school atmosphere in which the principles of the Bill of Rights pervade the values and attitudes of our young people. For, as Judge Learned Hand warned us twenty years ago:

> "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

Drafting Committee

Professor Pritchett, Chairman
Professor Starr
Professor O'Neil

4. JUSTICE

PRIORITY # 1

PROCEDURAL DUE PROCESS, PARTICULARLY IN CRIMINAL PROCEEDINGS

a. POSITION PAPER

THE BILL OF RIGHTS AND THE IDEA OF JUSTICE

by Harry W. Jones
Professor of Law
University of Chicago
Director of Research
American Bar Foundation

BY WAY OF PREFACE

Law teachers, by and large, are incurably pedagogical, and I am notoriously one of the worst of the breed in this respect. As I look back at what I have written in this brief and impressionistic paper, I am uncomfortably aware that I have exalted the "How to Teach It" part of my discussion, perhaps to the disadvantage of the "What is to be Taught." These prefatory paragraphs are offered as my plea in extenuation.

I feel deeply that the Bill of Rights should not be taught at all in our high schools and colleges unless it is taught right. Students, and particularly good ones, are inclined to be disdainful and suspicious of anything that comes across to them as platitude or "preaching." I am concerned about the possibility that adverse student attitudes towards badly designed Bill of Rights courses might carry over as cynical or otherwise harmful attitudes towards the Bill of Rights itself. My views in this matter are much like the views I have expressed elsewhere on the teaching of, or about, religion in the public schools. I am opposed to elementary and secondary courses on "religion," because I do not believe that our schools have, or can be expected to develop materials, methods or teaching personnel sufficient to the demanding and subtle task. When subjects of profound moral significance are in question, a low quality instructional program, undertaken for emotional or sentimental reasons and never completely thought through, can be much worse than no program at all.

The Bill of Rights, too, is an article of the faith by which we live. Its great and difficult subject matter is better let alone in the schools than presented by way of uncritical generalizations, pietistic affirmations, or 4th of July oratory. Contemporary American society, I suggest, suffers not from want of agreement in the abstract that "liberty," "equality" and "justice" are good things to have around but from want of understanding as to what "liberty," "equality" and "justice" mean and demand in concrete human situations. Whatever we are after in the deliberations of this Institute, it is not the creation of mere meaningless assent to the great propositions of American freedom on the part of high school and college students. We have too much of that already. Our goal, I take it, is to devise means, materials and teaching methods that will make plain to students that the Bill of Rights is not a body of theoretical principles or paper guarantees but a set of working rules for practical application across the board of our legal, political and social life. That mission is hard enough to accomplish with full-time law students in three years. How, if at all, can we give high school and college students even the beginning of an understanding of the realities of civil liberty and of the terribly difficult problems involved in applying constitutional generalizations to concrete and changing fact situations?

As an hypothesis for Institute discussion, I suggest that the simplified "case method" approach, outlined elsewhere in this paper as a way of teaching procedural "justice," is equally appropriate with respect to the teaching of "liberty" and "equality"--and perhaps most appropriate of all for teaching the "history" of constitutional freedom. Conceivably an entire short Bill of Rights course might be presented to high school or college students through no more than four concrete "cases," one each for "liberty," "equality," "history," and "justice." This would mean that our proposed short course would not try to cover everything; the course plan would proceed from a conviction that it is more instructive for students to put down four shafts of serious analysis in the vast field of the Bill of Rights than to commit to memory a mass of inert information.

Manifestly, to use a "case method" approach, we would have to take four illustrative cases from civil liberties areas in which there is no need to expend desperately short classroom time communicating indispensable background information. For example, if religious "liberty" were under discussion, the First Amendment guarantee of "free exercise" could be made meaningful to high school students in far fewer classroom hours than would be required for critical and realistic appraisal of the related First Amendment prohibition of any "establishment" of religion. Whatever sacrifices might have to be made as to comprehensiveness of Bill of Rights coverage, however, the organization of our projected course around four carefully devised problem "cases" would assure concreteness and immediacy in classroom discussions and enable the teacher, in his discretion, to relate the problems of civil liberty to the common knowledge and experience of the students before him.

Anyone present at this Boulder conference could come up, after a few months of work, with what would look like a respectable body of teaching materials: four carefully chosen and inherently interrelated "cases," a short list of student readings, and an explicit and sufficiently detailed teacher's manual. My guess, however, is that any set of teaching materials that we or another group like us might put together would have to pass through many trial-and-error stages of classroom experiment, revision, further experiment, and further revision. The urgent need would be for sustained collaboration in the preparation and actual classroom trial of the materials between law professors, who know the subject, and high school and college teachers, who know the student constituencies to which the materials and methods are addressed. For example, if a half dozen high schools could be persuaded to let the National Assembly try out its first set of materials on representative groups of their students, the next step would be to persuade a few people of the quality of Willard Hurst, Louis Pollak and Alan Westin to have a try at being high school teachers pro tempore, not as visiting Elks for a ceremonial hour but in close daily association with high school teachers of comparably high motivation and capacity.

The National Assembly on Teaching the Principles of the Bill of Rights has set itself one of the toughest educational goals I can think of. The specific materials that will be prepared on the basis of our several Institutes will almost certainly not be "teachable" in their first version, or even in their second or third editions. I am convinced, however, that the job at hand is profoundly worth doing--conceivably of even greater public importance than the effective teaching of Constitutional Law in the university law schools--and is within the reach of the best men in the schools, colleges and universities if these best men can be interested in the task as a major undertaking and persuaded to stay with it until the job is done.

I - THE MEANINGS OF "JUSTICE"

Justice has many faces. To ask "What is justice?" is to repeat the most often heard and most elusive question in the long history of Western legal philosophy. We are overwhelmed, at the outset, by a superabundance of definitions, characterizing justice variously as "the art of the good and the equitable," "an exact equivalent between merit and reward," "the condition brought about when no man thinks of another man as a means to his end," and, more recently, as "a tolerable accommodation of competing social interests" or "the faithful administration of the law as it is." One is reminded of the old Eastern parable of the three blind men, who, after having been led up to touch the elephant on its side, its leg and its trunk, reported, respectively, that an elephant is "very like a wall," "very like a tree," and "very like a snake." As with the three blind men of the fable, each of the definers of "justice" has grasped a part or aspect of the truth, but not, we would say, the whole of it.

Many sources have contributed to our conception of justice, and it is impossible here to take account of more than a few of the most influential of these contributions. The Hebrew prophets spoke of justice as righteousness, that is, as compassion and conformity to Divine Will. This, manifestly, is what "justice" means in the 72nd Psalm, "the most completely juridical passage in the Old Testament":

> "Give the king thy justice, O God
> And thy righteousness to the king's son,
> That he may judge thy people with right
> And thine afflicted with justice."

In the New Testament, and specifically in the strictures of Jesus against the scribes and Pharisees, the appeal to justice is most often an appeal from legalism, that is, from the letter of the law to its spirit. Justice, in this New Testament signification, is not too unlike the "equity" described by Aristotle as "rectification of law wherein law is defective because of its generality." In its Biblical sense, then, justice requires that controversies between men be resolved in a way that takes proper account both of the demands of the "law," or general rule, and of the appeal of the concrete human situation.

In Greek moral philosophy, "justice," at first, carries the meaning of universal virtue, moral perfection in general. From this not too helpful Platonic starting point, Aristotle proceeds to his analysis of justice as a matter of right proportion in interpersonal relations and in the relations of the individual and the state: "distributive justice," the award of state honors and benefits to citizens in proportion to the contribution of each to the polis; "equalizing justice," the mean between loss and gain in interpersonal transactions; "corrective (or legal) justice," reparation ordered by the judge in proportion to harm inflicted by the offender on another person or on the community. From these Aristotelian categories of particular justice, and specifically from the idea of distributive justice, Roman jurisprudence constructed its theory of justice as a form of dueness, the *suum cuique*, the rendering to each man of that which is *his "due."* Ulpian's familiar definition, *"Justitia est constans et perpetua voluntas jus suum cuique tribuendi,"* served, in turn, as the literary source for Thomas Aquinas's definition of "justice" as a habit of mind pursuant to which the just man renders to each other man his due, and the idea of *dueness*, the appropriateness of the judgment to the merit or demerit of the individual concerned, became firmly established in Western legal theory.

"Justice," however, is not a tractable word in common speech or even in philosophical or jurisprudential literature. In some contexts, as when used in the phrase "the administration of justice," justice means essentially, and little more than, disinterested and consistent application of the existing positive law. In other contexts, an appeal to "justice" signifies a reference to some moral norm higher than the imperative of the positive law, for example to an asserted precept of the natural law. Consider, similarly, the quite different, even contradictory, things that may be signified in legal discourse by the familiar charge that some statutory policy is being administered "unjustly" by a court or administrative agency. At times, this charge expresses the speaker's conviction that the statutory policy is being applied unequally, that is, in a way that differs unfairly from person to person or from case to case. But at other times, and I suspect rather more often, the charge that a statutory policy is being administered "unjustly" signifies the speaker's belief that the statute is being applied *too* equally, that is, in a mechanical and undiscriminating way and to concrete situations within its letter but not within its spirit.

It is for reasons like those just stated that many great legal theorists--Holmes, Kelsen, and Morris Cohen, to mention only three--have despaired of talk of "justice" and have wished that the word could be banished from the vocabulary of law. This counsel of despair goes too far, or so it seems to me. A sense of justice--or at least what Edmund Cahn calls a "sense of injustice"--has verifiable existence in the mind and conscience of man. It is one thing to say that the idea of "justice" does not lend itself to scientific definition; it is quite another thing to say that "justice" is too elusive a notion to be worth talking about at all.

The literature of "justice" reveals, at least, certain recurrent themes, five of which seem particularly relevant to our present inquiry:

1 - The concept of the suum cuique, that is, of an award or judgment related, or proportioned in some way, to the "due" of the person before the court;

2 - The concept of equality, the transformation of the suum cuique idea wrought by the democratic theory that all men have the same "due" insofar as the operations of the political order are concerned;

3 - The concept of regularity and consistency in the administration of "standing laws," an aspect of "justice," certainly, but not the whole of "justice" in any system which, like ours, rejects the notion that "justice" and "legality" are synonyms;

4 - The concept, supplementing and qualifying the idea of regularity and consistency, that positive law and day-to-day law administration must conform to at least some norms of higher moral obligation, whether these higher norms be set by divine revelation, by the natural law, or by the text of a written or unwritten constitution; and

5 - The concept of "equity" in its Aristotelian sense, that is of discriminating individualization, on the occasions when there is need for it, in the application of general legal precepts to concrete social situations.

To be sure, one of these constituent ideas of "justice" may come into collision with another from time to time--as in criminal law administration when the concept of equality may seem to point towards identical sentences for two participants in the same crime and the concept of discriminating individualization towards a less severe or different punishment for one than for the other--but this is not a phenomenon unique to discussions of "justice." Perhaps, in default of an available scientific definition of "justice," we might settle for something like the one implicit in Max Radin's observation, twenty years ago, that:

> "Justice is achieved only when just men perform the technical task of law as humane men should act when they act humanely."

I have never worked harder in my life than on the four pages just preceding, but how far have I taken us?

As I understand it, my assignment for this Institute is to suggest how the complex idea of "justice" relates to the institutional guarantees of the Bill of Rights and--to make it harder--to state this relation in terms that might conceivably be made meaningful to high school and college students. I hope I will be forgiven if, at this "get down to business" stage in my paper, I try to simplify my Institute assignment. Justice, as we have observed, has many faces and can mean many things. I have been asked to write a paper, not on justice as an individual moral quality or on "social justice" as the ultimate end of organized society, but on justice in the specific context of civil liberties. Accordingly, and to get hold of something manageable, I take my clue from page 124 of the Report of the Williamstown Workshop at which Alan Westin has this to say:

> "A challenging way to structure a discussion of civil liberties is to divide the area into three fields--liberty, justice, and equality . . . The area of justice describes what many others call procedural due process, or the areas of hearing, appeal and formal process . . . You are dealing, in short, with the whole mechanism by which liberty, equality, property rights and all other such values are tested and guaranteed."

The face or phase of justice on which my emphasis will be put for the rest of this paper is, then, procedural justice, fairness and respect for human dignity in the conduct of adjudicative proceedings.

Often, in the rest of this paper, I will be using the term "procedural due process" to signify procedural justice. This usage may be confusing from time to time, in that it may suggest that my references to procedural due process are references to the technical requirements of the due process clauses of the Fifth and Fourteenth Amendments, as interpreted by the federal courts. Whatever the risk of confusion, "procedural due process" is too good a term to let go, because its normative character happens to be expressed in the word "due," the most durable justice word of them all. Conceivably, each reference to "procedural due process" in the following pages will serve as a reminder that our ideas of procedural justice are not wholly independent of, nor wholly uninfluenced by, the broader concepts or sentiments that make up our idea or "sense" of justice as a general virtue of men and political societies.

Procedural due process has a manifest relation to each of my five "recurrent themes" of justice. Consider, for a moment, themes 2 to 5 inclusive: equality, regularity and consistency, conformity to higher norms, and "equity." No man has effective equality if he is treated unequally in the adjudicative processes by which essential interests are determined. In a procedure-dominated system like ours, regularity and consistency in procedure are as important to the litigant as regularity and consistency in the application of the substantive law--and far easier for the state to provide, maintain and supervise. Our legal traditions in matters of fair procedure embody more than a few norms of higher obligation to which legislatures and enforcement officers must conform; so long as the Bill of Rights stands, procedural justice can never be equated in the United States with mere procedural "legality." Orderly procedures, calculated to enable an accused person to make his best case before an unhurried and disinterested tribunal, are indispensable to the "equity" aspect of justice; adjudicative processes can have no element of discriminating individualization if the party before the court is treated as a mere blank for routine processing.

Thus we have related procedural due process to four of the five recurrent themes of justice. What of the other theme, the concept of the suum cuique? Here the relation is clearest of all. The phrase "procedural due process" says at least this much: whatever else may be "due" to a man in our society, his "due" includes respect for his dignity as a human being--you could say "as a child of God" without changing my meaning--in the day-to-day operations of the legal order. The state may or may not owe a man a living or security or effective opportunity to make his way; these are issues of public policy on which reasonable opinions differ. "Due process" proclaims that the state does owe every man a duty of consideration and respect before his vital interests are adversely adjudicated.

II - THE PRECARIOUS CONSENSUS ON PROCEDURAL DUE PROCESS

Procedural due process is only one of the faces of justice, but it is certainly not the least significant of men's justice aspirations. Just procedure is one of Paul Freund's "passive" liberties, but the struggle for procedural justice came first in our legal and political development, and much of the history of Anglo-American freedom is a chronicle of this struggle for justice in legal procedures.

A wide consensus exists in our society that procedural due process, at least in the abstract, is an important civic value. Several related but distinct grounds support this consensus, among them the following:

1 - Fear of conviction of the innocent: concern that people may be wrongly convicted of crime, or unjustly injured in other vital interests, if regular and traditional procedures are not followed in adjudication. Inherent in, or closely related to, this concern is the value choice embodied in the familiar maxim, "Better a hundred guilty men go free than that one innocent man be convicted."

2 - Distrust of state power-holders: the characteristic Anglo-American suspicion (perhaps now on the decline) of state officers and functionaries, and the accompanying conviction that the individual needs an elaborate structure of protection in his unequal encounters with policemen, prosecutors, administrative officials, and even judges.

3 - Belief in human dignity: the widespread idea, largely of religious origin, that the individual, even one accused of crime, is worthy of respect as a human being, entitled to a chance to make his best defense, and not an item for inventory like K___ in Kafka's The Trial.

4 - Idealistic view of the state: the notion, proceeding perhaps from Greek idealization of the polis and from Christian ideas that civil authority is an instrument of Divine government, that the state should not play an "ignoble role" in law administration and enforcement.

5 - The contagion theory of tyranny: the idea, to which much political history gives support, that civil liberties are entire and that departures from procedural justice will soon be followed by deprivations of substantive liberty.

The foregoing are, I believe, the ideological-philosophical-political positions that have been most influential in support of procedural due process in the American context.

No one (except perhaps some psychotic from the American Nazi Party) would challenge, frankly and head on, the existing consensus supporting the institutions of procedural justice embodied in the Bill of Rights. The consensus, however, is not as favorable to procedural justice as it would seem to be. When discussion gets down to cases, many--I am tempted to say "most"-- members of our society express impatience with what they think of as "procedural niceties" or "legalistic technicalities." The man in the street sees no inconsistency in his position; he warmly favors a constitutional principle that no one be compelled in a criminal case to be a witness against himself, and, at the same time, he thinks that "something should be done to prevent crooks and Reds from taking the Fifth." "He's guilty, isn't he?" and "Where there's smoke, there's fire" are familiar reflections of a popular attitude far more widespread than we like to admit. Laymen, even intelligent and educated citizens, are not too concerned about such considerations as that government should not play an "ignoble role"; to the layman the purpose of the criminal law is to get criminals out of circulation, and he wants the police and the prosecutors to get on with it.

This tension in public attitude--warmly favorable to the Bill of Rights in principle but impatient with "technicalities" in criminal prosecutions and legislative investigations--is an old story, but the tension has been greatly increased by political and social developments in the United States during the past thirty or forty years. Indeed, I would say that there now is a full fledged "alternative position" in the United States with respect to the application of the Bill of Rights in many situations. Fear of aggressive world Communism, and specifically of treason or sabotage by Soviet agents or other Communists, caused many people to take the position a few years ago that civil liberties are not for the disloyal, that is, that one who is not *himself* committed to constitutional government has no moral standing, and so should have no legal standing, to rely on the procedural guarantees of the Bill of Rights. This was not a new theory, not even in the United States. We recall that it is almost exactly the theory on which Lincoln, our greatest President, suspended the writ of habeas corpus in his effort to suppress the Copperheads.

Today the most important expressions of what I have called the "alternative position" with respect to the Bill of Rights are in relation to the massive contemporary problem of organized crime. Many people of general libertarian sympathies feel strongly that our police and prosecuting authorities are handicapped unbearably by "procedural technicalities" in their efforts against gangster organizations and criminal syndicates. The "technicalities" complained of are, in very large part, precisely the procedural guarantees of the Bill of Rights. A widespread feeling exists, and not entirely among policemen and prosecutors, that law enforcement officers should not have to "treat gangsters with kid gloves." There is manifest public discontent whenever the conviction of a gangster of notorious eminence is set aside by an appellate court on "technical" procedural grounds like, for example, the improper use of wiretapping evidence at his trial. This contemporary collision of social interests--protection of public order and safety vs. maintenance of procedural due process--is not a problem to be brushed off or analyzed in black and white terms; it is certainly a problem to which we will have to invite the attention of high school and college students in any serious presentation of Bill of Rights issues.

Public appraisal of the "alternative positions" with respect to procedural due process is made more difficult by the intrusion, in recent Bill of Rights controversies, of certain special and in a sense "extraneous" political issues. In the American constitutional system, the Supreme Court of the United States has the last and authoritative say on most borderline questions of procedural justice. Occasionally the exercise of judicial power in procedural due process cases brings the Court into collision with Congress--as in cases of prosecution for contempt of Congress--or into a position of conflict with federal enforcement officers who, in the Court's judgment, have gone beyond the bounds of procedural justice in their investigative or prosecuting activities. Fortunately there has been no open strife between the President and the Court in recent years; if federal law enforcement officers have been disgruntled by what they consider undue judicial "activism" in procedural due process cases, they have confined the expression of their discontent largely to private grumbling. Other political "influentials" including Congressmen, have taken up the cudgels from time to time, however, and the familiar doctrinaire charge that appointed judges are "tying the hands" of officers of the politically responsible executive department appears occasionally in procedural due process controversies.

Contemporary public attitudes on procedural due process questions are made complicated, in a more important way, by the circumstance that many of the Supreme Court's most significant recent decisions in the general area of procedural justice have involved questions of the extent to which the explicit procedural guarantees of the Bill of Rights of the Constitution of the United States run against the States and apply in state criminal proceedings. In cases of this character, as in the 1943 landmark decision in Powell v. Alabama, the issue of procedural justice is inextricable from the issue of federalism, and the Supreme Court's decision in such a case is likely to be criticized less on its merits as an application of procedural due process than as an unjustified and unduly "activist" invasion of "States' rights." This line of criticism of Supreme Court decisions in state political justice cases is likely to be more virulent in the political conditions of the 1960's than it has been in the past, because of the existence of a curious coalition of persons and groups highly critical of the Supreme Court and all its works, some because of the Court's segregation decisions, some because of the school prayer cases, and others because they have been persuaded for one reason or another that the Court is hungry for power and usually wrong in whatever it does.

This, I think, is as far as I should go in this paper in describing the immediately contemporary political factors that complicate or obscure the public consensus on procedural justice. The reasons for my self-denying ordinance are these: (1) I am by no means clear as to the extent to which a Bill of Rights course, at least for high school students, can undertake to acquaint students with the complex and subtle problems of federalism and judicial review generally; and (2) if these basic political-legal problems are to be treated in our Bill of Rights course, they are more appropriate for discussion in our "history," "liberty" and "equality" papers, where issues of federalism and judicial review are central, than in this paper on "justice," to which they are more obliquely related. The contemporary political controversies over federalism and judicial review could not be omitted entirely from this paper, however, because they are certainly elements that affect today's uncertain and somewhat confused public consensus on the place of procedural justice in the hierarchy of American political values.

III - TEACHING PROCEDURAL DUE PROCESS

A - What Is To Be Taught: The Province of Procedural Justice.

If my paper were the only one being written for this Institute, I would insist that the idea of "justice" is inextricable from the idea of "equality"--and perhaps, too, from the idea of "liberty"--and I would contend further that "justice" in its sense as procedural due process is imperfectly understood unless seen in the perspective of "history." Three other papers have been commissioned, however, so I must assume that I am to leave equality to Pollak, liberty to Hurst, and history to Westin. On this fourfold division of the Bill of Rights area, which of our constitutional safeguards relate to procedural justice, and on which of these justice-related guarantees should the emphasis be put in introducing high school and college students to the justice dimension of their constitutional heritage? All I can think of to do is to undertake a catalogue of the individual freedoms enumerated in the Constitution of the United States and thereafter suggest an appropriate distribution of the items in this Bill of Rights catalogue among the Institute's four paper writers.

I turn, first, to the Bill of Rights "properly so-called," as John Austin would have said, that is, to Amendments I - X inclusive. The First Amendment guarantees are substantive in content and so, I take it, fall to liberty and Hurst. Amendments *II* (right to bear arms), and *III* (no quartering of soldiers) are for the liberty paper also, if, indeed, these venerable curios can be given any time in a simple and necessarily condensed course for high school and college students. Amendments *IV* (searches and seizures), *V* (grand jury, double jeopardy, self-incrimination, due process of law, and just compensation), *VI* (procedural safeguards in criminal proceedings), *VII* (jury trial in civil cases) and *VIII* (bail) are manifestly justice-related, and so within my Institute assignment, although I will record now that I consider the problem of jury trial in civil cases so complex a matter, in view of court distinctions and prevailing differences in federal and state practice, that I am against giving any emphasis to Amendment VII in our high school or college course. Amendments *IX* and *X* are not procedural justice-related; if these provisions of the Bill of Rights are to be included in our Institute discussions, it will have to be on the theory that they are part of our constitutional history or in some way related to contemporary problems of liberty or equality.

Of the amendments other than the first ten, Amendments *XIII*, *XV*, and *XIX* are certainly within our Institute endeavor but are for liberty or history rather than for justice in its present procedural signification. Amendment *XIV*, insofar as "equal protection" is concerned (and probably "privileges and immunities," too) is for Pollak and equality; the due process clause, in its procedural dimension, is clearly for justice and so for me.

Our inventory of individual rights is still not complete, since the Constitution itself, as originally drafted and submitted for ratification, contains several significant safeguards of individual freedom. Section 9 of Article I prohibits suspension of the writ of *habeas corpus* and forbids the passage of any bill of attainder or *ex post facto law*. Section 1 of Article III is also justice-related, since its provision for judicial tenure during good behavior is designed not to achieve job security for judges but to make it as certain as possible that individuals in civil and criminal proceedings will have their cases heard before genuinely independent judges. The third clause of Section 2 of Article III (criminal venue and jury trial) is similarly within the justice heading of our Bill of Rights inventory, as are both of the clauses (treason) in Section 3 of Article III. Let me say in passing, however, that the restrictive definition of treason in Section 3 of Article III and the accompanying provision against any "attainder of treason," seem to me more appropriate for the paper on history than for the paper on procedural justice, assuming, for the moment that the treason theme is to be taken up at all in our Institute discussions. The remaining items for our Bill of Rights catalogue are Section 2 of Article IV (privileges and immunities), and the final clause of Section 3 of Article VI (no religious test). Both of these provisions seem to me to fall between liberty and equality and are not within the province of procedural justice.

One thing has become painfully clear in the course of this Bill of Rights inventory. Try as I have to maintain a system of selective admission to the province of procedural justice--and so to parcel out as many specific Bill of Rights guarantees as I can to my colleagues Hurst, Pollak and Westin--"justice" remains the residuary heading of our four Institute categories. This is not an accident; it reflects the experience and conviction of the men who wrote the great guarantees of individual freedom into the Constitution and the Bill of Rights. They were procedure-minded. Like their English forebears the founders of American constitutionalism believed that explicit procedural remedies and prohibitions--*habeas corpus*, immunity from self-incrimination, the right to reasonable bail--are even more important than abstract declarations of human rights in securing the freedom of the individual against encroachment by state power-holders. I think that they were quite right in this estimate. My only regret is that they have left me with an unmanageably large and mixed bag of specific justice-related safeguards, including the following:

Habeas corpus (Article I, Section 9)
Bills of attainder (Article I, Section 9 and Section 10)
Ex post facto laws (Article I, Section 9 and Section 10)
Independent judiciary (Article III, Section 1)
Trial by jury in criminal cases (Article III, Section 2)
Strict definition of treason and no attainder of treason (Article III, Section 3)
Unreasonable searches and seizures (Amendment IV)
Grand jury (Amendment V)
Double jeopardy (Amendment V)
Self-incrimination (Amendment V)
Due process of law (Amendments V and XIV)

Just compensation (Amendment V)
Specific safeguards in criminal cases (Amendment VI)
Jury trial in civil cases (Amendment VII)
Excessive bail (Amendment VIII)
Cruel and unusual punishments (Amendment VIII)

How, if at all, can the unifying principle or policy underlying this great body of procedural detail be communicated to high school and college students, and where are we to begin in teaching the essence of procedural justice? Manifestly, we will have need for principles of selection and for a choice of emphasis.

B - How To Teach It: A Selective "Case" Approach to Procedural Justice.

If I am right in my analysis of the "alternative positions" that exist today with respect to the procedural justice provisions of the Bill of Rights, the central issue relates not to the value of procedural justice in the abstract, but to contemporary problems in the application of procedural due process in certain concrete situations, that is, in the investigation and prosecution of organized crime, subversive activities, and the like. It follows, I think, that the best way to introduce high school and college students to the realities of procedural justice is by way of a concrete problem-situation, to be discussed in class as an exercise in the application of procedural due process. I propose that we make use of a fairly simple hypothetical criminal case, structuring the discussion so that the students are to follow the progress of the case step by step, considering, at each stage of the proceeding, the specific Bill of Rights safeguards on which the accused person can rely. To make my point, I offer the following Problem Case as a starting point for Institute consideration.

PROBLEM CASE

On September 1, 1963, at about 11:00 in the morning, a well dressed young man carrying a small briefcase enters the First National Bank of Capitol City, walks over to the one teller's window then open for business, and hands the teller a note, printed in red ink and capital letters and reading: "KEEP YOUR MOUTH SHUT AND HAND OVER ALL THE MONEY IN YOUR CAGE. I AM DESPERATE AND WILL SHOOT TO KILL." The teller reads the note and glances quickly at the man in front of him, noting that he has one hand under his coat as if to draw a revolver from a shoulder holster. Frightened by the threat, the teller clears out his currency drawers and hands the robber $3,610 in bills and a bag of $100 in quarters. The robber quickly puts the bills and bag of coins into his briefcase and, after whispering "Keep quiet till I get out, or I'll let you have it," walks out of the bank. An accomplice is waiting at the wheel of an automobile standing immediately outside the bank with its motor running. The robber gets into the automobile and is driven away before the frightened teller summons up enough courage to give an alarm.

The robbery of a national bank is a federal offense, and the local field office of the FBI, in cooperation with the local United States Attorney, sets about at once to discover who the bank robbers had been. The victimized bank teller advises the investigators that he is sure that he could identify the man who threatened him in the bank and describes him as "pretty tall and thin, with light hair and a kind of round scar, as big as a half dollar, on his forehead." A bystander, who had noticed the car standing in front of the bank with its motor running, reports to the federal agents that the get-away car was a light colored four-door sedan, probably a two or three year old Chevrolet, and that he had noticed particularly that the glass in the right rear window was badly smashed. The information received from the teller and the bystander is communicated at once to all nearby police departments, with a request that they keep an eye out for a person or a car answering the descriptions given.

Eight days after the robbery of the First National Bank, a state motorcycle trooper, patroling a highway in the vicinity of Capitol City, sees and attempts to flag down a speeding car. The trooper gets close enough to the car to observe that it is a 1960 white Chevrolet four-door sedan and that it has a badly smashed right rear window, but the driver of the car speeds up when he hears the trooper's siren and manages to get away. The trooper, however, has seen the car's license number and writes it down immediately after the incident. A routine check with the State Bureau of Motor Vehicles discloses that the license number involved had been issued to Arthur Accused, a 28 year old resident of Capitol City. This information is at once communicated to the FBI, and a check of its criminal files reveals that Arthur Accused has been arrested twice in the past on suspicion of automobile theft, although the charges against him were dismissed on both occasions for want of evidence. Accused's photograph in the local "rogues' gallery" shows that he has a prominent scar on his forehead. WHAT DOES PROCEDURAL

DUE PROCESS REQUIRE WITH RESPECT TO THE FURTHER INVESTIGATION AND POSSIBLE CRIMINAL PROSECUTION OF ARTHUR ACCUSED?

I suggest that this Problem Case be used as a springboard for carefully structured step-by-step analysis of the procedural safeguards guaranteed to an accused person by the Bill of Rights and other relevant provisions of the Constitution of the United States. Classroom discussion would begin with the investigative stage of the proceeding, emphasizing:

1 - The protection afforded to Arthur Accused by the Fourth Amendment prohibition of "unreasonable searches and seizures." (E.g., the FBI cannot search Accused's home with the hope of finding money or other tangible evidence of the crime unless and until they secure a search warrant.)

2 - Arthur Accused's privilege against self-incrimination, as guaranteed to him by the Fifth Amendment. (E.g., he must be warned that any statement he makes may be used against him, and any coerced confession cannot be used against him at his trial.)

Discussion of the Problem Case would then proceed to the litigation stages of the proceeding, this, of course, on the explicit assumption that the investigation has developed a sufficient basis for a formal charge against Accused. Limited time and student background would doubtless require only passing mention of certain stages--e.g., the preliminary hearing--but at least the following aspect of procedural due process would be developed in discussion:

1 - The requirement of the Fifth Amendment that Accused be indicted by a grand jury.

2 - Accused's right, as guaranteed by the Eighth Amendment, to reasonable bail, with heavy stress on the point that the right to bail is made effective by the existence of the writ of habeas corpus (Article I, Section 9).

3 - Accused's right under the Sixth Amendment to a "speedy and public trial" by an impartial jury (and before a genuinely independent judge (Article III, Section 1).

4 - Accused's rights, under the Sixth Amendment, to the assistance of counsel and to compulsory process for obtaining witnesses in his favor. (In view of the significance of recent decisions requiring the provision of counsel for indigent defendants, this note should certainly be brought into the discussion.)

On the explicit factual assumption, now, that a jury trial in Accused's case has resulted in a verdict of acquittal, the discussion would be concluded with the following two points:

1 - The verdict of acquittal is final, and under Article III, Section 2 and Amendment V, the prosecution has no right of appeal.

2 - The Fifth Amendment prohibition of double jeopardy makes it impossible to try Arthur Accused again for the same offense, however incriminating some subsequently found evidence might be against him.

The foregoing are, I believe, the Bill of Rights safeguards that could most effectively be communicated to students in the limited time available for the task. With advanced students, and perhaps on an experimental basis with less advanced students, classroom discussion should be broadened so as to bring in, from time to time and by variations of the facts of the Problem Case, such safeguards as those against bills of attainder (*e.g.*, Congress could not pass a statute declaring Accused punishable as a bank robber), *ex post facto* laws (*e.g.*, if bank robbery was not a federal offense on September 1, 1963, Congress could not make it so and have the statute apply retroactively to Arthur Accused), and the Eighth Amendment prohibition of cruel and unusual punishments (*e.g.*, if Accused had been convicted, he could not have been sentenced to amputation of his right arm, to service as a guinea pig for medical experiments, or, arguably, to public whipping). Some of these basic guarantees will seem painfully obvious to us or even to a second year law student, but they are safeguards of history and substance and worth at least mention in a course designed to inspire citizen fidelity to the Bill of Rights.

Why do I suggest the use of a Problem Case like this one as the center for student analysis of the application of the "justice" provisions of the Bill of Rights? My principles of selection were these:

1 - I recommend the use of a mercenary crime of violence, rather than some kind of "political"

offense, because the use of a fact-situation with marked political overtones would almost certainly obscure the importance of procedural justice as such. (Beyond this, the function of the Bill of Rights as a safeguard against the use of law to curb freedom of expression will be developed fully in our Institute paper on the concept of "liberty.")

2 - A federal criminal case is better than a state criminal case, for our instructional purposes, because the use of a federal case avoids, at least for a while, the subtle and difficult question of the extent to which the procedural safeguards of the Bill of Rights are made applicable, through the due process clause of the Fourteenth Amendment, to state criminal proceedings. (When I taught Constitutional Law at Berkeley years ago, I used to spend three full classroom hours on this problem of "incorporation." We certainly do not want to spring it, at the outset, on a group of high school or college students.) Conceivably, the technical point could be brought in later in class discussion of the case of Arthur Accused, after members of the class have begun to develop the beginning of an understanding of such constitutional niceties.

3 - It is very important that our Problem Case be one which is not inherently "loaded" against the agents of law enforcement. School and college discussions of procedural justice should not risk conveying the impression that the exclusive function of procedural due process is to safeguard the individual against corrupt or oppressive police officers. Students should be brought to understand the Bill of Rights as a body of "rules of the game" to which honest and dedicated law enforcement personnel must conform in their vitally important work. The facts of our Problem Case make it clear that the enforcement officers have good cause for an intensive follow-up of Arthur Accused, and there is little danger that anyone in the class will get the impression that the law enforcement officials concerned are "Cossacks" or Gestapo agents trying to pin something on a manifestly innocent man.

4 - For reasons just stated, our Problem Case is one in which there is good cause for further investigative action against Arthur Accused. At the same time, the stated facts of the Problem Case are such that there is a real danger of unreliable eye-witness identification, of coincidence in Accused's appearance and in the condition of the get-away car, and of prejudice against Accused because of his past criminal record. A very good

student will spot these dangers without prompting; students of average capacity will recognize the dangers if they are pointed out in classroom discussion. We have, then, a case in which the role of procedural due process in reducing the likelihood of conviction of the innocent can be made plain without too much didactic commentary.

If one of us had taught the "justice" part of a Bill of Rights course in this problem-structured and therefore highly selective way, would he be overwhelmed, at the end of the course, by guilt that he had left undone so many things that he ought to have done? Consider the many applications of procedural due process to which the class would have been introduced only obliquely if at all: fair notice and hearing in administrative proceedings, the requirements of procedural justice in civil suits and in Congressional investigations, the applicability of the first ten Amendments to state criminal proceedings, the implications of procedural due process for the affairs of labor unions, universities, and private business corporations--all these and many more.

The choice that has to be made is the usual one between survey coverage of a wide terrain and analysis in depth of a concrete and manageable illustrative problem. I have no doubt whatever that the problem method of analysis in depth is better for the teaching of procedural justice. However painful the sacrifice in coverage, a problem-structured approach will be more compelling of student attention, closer to the living realities of procedural due process, and far more likely to leave students with insights that they will retain as citizens long after the course itself is over.

b. JUSTICE DISCUSSION HIGH POINTS

Mr. Coleman (Appointed Commentator)

I found this paper very interesting and very exciting though I was not satisfied with the definition of justice. I attempted to put myself in the position of a teacher and tried to find out what I would want to accomplish. First I envisioned at least five different types of students and tried to see what the paper would mean to them. One would be the student I was unable to reach and he eventually found himself the subject of a criminal proceeding. I rejected him. The next type would be a student who later became the victim of a criminal act by another one of my students. I would hope to explain to that prospective victim why, if a person had committed a crime against him and was not convicted, society had nevertheless discharged its obligation. The third group would be the public at large, namely a person who knew about the crime, but not the individual who committed it nor the victim. I felt an obligation to see that that person would understand the process of justice. Fourth, I hoped the class contained potential judges and legislators. They should have some understanding of the problem of justice. Finally, I hoped in the class would be a person like yourselves, that I would be fortunate enough to touch with fire and get him to think of the Bill of Rights as so important that at least part of his adult life should be spent in pursuit of having society appreciate it.

The victim and the community at large would have to understand that the two problems in connection with the Bill of Rights were that most of the justice or lack of justice that is dispensed in the society is dispensed by the state courts and not by the federal courts, Therefore, Supreme Court decisions with high ideas of justice were not sufficient. I would not stop with the discussion of Federalism where the paper stops. I do think we have to communicate an appreciation of the interrelationship of the state and federal courts in our society. Secondly, I think our emphasis should be law and constitutional law, but particularly in the field of justice it is inadequate to say that a criminal practice be merely constitutional. To inspire our future great judges, U. S. prosecutors, state prosecutors and the legislature, we have to indicate that the standard of dispensing justice sometimes has to be much higher than what is commanded by the Constitution.

Our students in the next twenty years, indeed today, have to think of justice in terms of international law. In dealing with a person from one of the emerging nations, from Russia, if we equate our ideas of justice with those that are necessarily right, we may well say that the actions of their courts are necessarily wrong merely because they do not agree with the way we would handle a problem. We ought to put more emphasis on the idea of history; why we have certain practices which are based upon history and our experience. If we examine the Russian experience you could say that their particular ideas of justice are as much an improvement for their society as our advanced ideas of justice are for our society.

I would try to touch certain students with fire through teaching materials that express some of the great ideas of justice. The notion should also be imparted to them that a large part of the concepts of justice as we would like to see it in our society involves a matter of taste. To the extent that we can raise the taste and the expectation, we will have that much more justice in our society. From the paper a student may think that a large number of safeguards for the individuals are obstacles to efficient investigation, and with these society really does not have a fair chance. In any criminal proceeding, even with these safeguards, the state usually has the best of the game in terms of the power and the money which it has to do the investigation. Students should understand these safeguards do not completely shift the balance of power.

Professor Simon (Appointed Commentator)

The due process approach, as well as the section on justice would be a wonderful section for the teacher of teachers, a consideration which inevitably we will have to come to as one of our principal objectives. My criticism is on the areas the writer ignores. The Bill of Rights is a pushover when applied to toilet training, Boy Scouts, Madison Avenue, speech writers and Jack Paar. It only gets rough when it is applied to those areas like the establishment clause, judicial review, political offenses, and crimes that violate strongly held social taboos. If our approach is going to have any meaning, it must have some guts and challenge students critically where they are precommitted to what we have called the alternative position. In his instructional areas to this seminar, the author demonstrated an acute awareness of this problem, but in the instructional areas for the students, he skirts away from it, nor is he alone. There was the opinion here that our material must be bland enough so that it will be accepted in all areas of our nation, so no teacher would be on the spot. I warn the seminar that if we produce anything of this sort, we will be doing both the Bill of Rights and the student a disservice. If we, through our efforts give substance to Professor Westin's patriotic myth, we will make the Bill of Rights and its application even less acceptable than it is today. Our efforts and those that follow must lead to teaching that will make students face the most difficult, not the easiest application of the Bill of Rights. Our author's test case will not do it.

Mr. Pemberton (Appointed Commentator)

We should come to grips with the contest between efficient law enforcement and the protection of the accused against the overwhelming power of the state. Also, in the statement of the facts, we should not say, without any collateral reference to the problems that this raises, that in a check of the FBI's criminal files "Arthur Accused" has been arrested twice in the past on suspicion of automobile theft without asking, is that a proper arrest? Do our standards permit arrest on suspicion? What business has the FBI of keeping records of improper arrests or even of proper arrests that did not result in a conviction? Why should any agency of government have a record that somebody charged me with a crime once if the ultimate disposition was determined in my favor? A case which refers to such facts should have the fact posed as a question with no answer given.

Finally, the case of Arthur Accused might be modified to invoke some state Constitutional provisions. I am inclined to agree that the facts should include problems of federalism and a number of questions involving the application of criminal law in state courts.

Professor Jones

The compromise that in justice the distinctive emphasis be put on procedure is entirely agreeable to me. It reflects the experience and conviction of the men who wrote the great guarantees of freedom into the Constitution and the Bill of Rights. They were procedure minded. I want the importance of procedure to come through because without procedural regularity, there is no freedom. I have come to the conclusion that procedural rights today are threatened far more by the "don't tie the hands of the police" idea than by the now outdated and unlikely notion that "it's all right to frame this fellow because he's a Communist or a Radical."

Dean Pye

The case should be more bland as the first example. The most important conflict in this area today is the supposed necessity of the police officer to arrest a suspicious defendant in order to prevent crime, which is the new way of saying arrest on suspicion. My trouble with the example case is that when the question is asked at the end, "What procedural due process is he entitled to?", you get into difficulty. He is entitled not to be arrested without probable cause. However, the agent could go to his house, arrest him, search him incident to the arrest, find the goods there, and the rest of the questions become of academic interest only. I suggest another case in which we find the man in a neighborhood where there have been housebreakings before and there is a good suspicion that he is the one who is doing it but there is not probable cause. Can he be arrested? It poses the problem in the procedural context Professor Jones speaks of. We can take it a step further. One of the more effective methods of presenting it is if you take one example of a procedure where you can usually get conformity of opinion that this individual is entitled to his rights and where his rights seem more important to the student than the public interest. The second phase gives an example of some other type of procedure which the students see as patently unfair. Then a third case is presented in which the student is required to choose which of these earlier two types of procedure he would apply to an unpopular defendant. This presentation allows him to see the importance of procedure qua procedure and that it must apply to the unpopular as well as to the ordinary bland case.

Professor Westin

We do not have to select any single example case that will serve every purpose; instead it is both easier and better teaching to think of a progression of different cases, each one of which can hit a different point but will add up to a thorough exploration of all the areas that we think ought to be contained in that concept. Two more types of cases should be considered. First, justice in the administrative hearing ought to be in here to comprehend how much less actual due process operates when you depart from the courtroom and enter the other forums in our society. This should be mixed with observation that for every person who gets into court, hundreds are involved in hearings before state and federal administrative agencies. A loyalty-security administration hearing used here raises two questions: How much you water down the rigid due process that courts provide when your social purpose shifts and the whole question of whether the degree of punishment that results from various types of administrative hearings is small enough that you are allowed to water down the due process requirements. These questions would be very meaningful for high school students.

The second case I put forward more tentatively. The average student would probably be up against some sort of private group due process situation even more than he would be involved in the administrative hearing. This type of case should capture the idea that these standards of justice are not just for official government structure but that they permeate our whole private approach in the baseball club, in the corporation, in the union, in the church, in the university. If you can teach only a limited number, the courts must be first.

We might design five cases in order to give schools and communities a choice of how deeply they wanted to carry students along in this direction. This last case would hold the lowest priority.

Judge Frantz Procedural due process should be mentioned in the civil aspects as well as the criminal.

Professor Jones Very little classroom time is going to be available for the teaching of the "Justice" phases of the Bill of Rights. That is why I have omitted the administrative law and other civil aspects of procedural due process.

Professor Emerson One of the most serious issues which is omitted is in respect to police practices, the question of police brutality. I think that ought to be considered because a large part of the relationship between the citizen who gets in trouble with the law, particularly the indigent and the minority, is the violence on the part of the police. We would have to develop actual materials about police techniques. The question of police brutality should be discussed in terms of other and better methods that might be possible.

Professor Jones I would hate to see a student get the basic impression that procedural due process is essentially a protection against the brutal cop. I think it is a protection against all cops, including the most honorable, dedicated and humane of them. Certainly the theme of police methods and possible police brutality should be in there somewhere, but it should not be central.

Professor Cross This is a tough case, not a bland one. I think the trouble is with its presentation. As a historian I am not used to abstract cases. I think the very name Arthur Accused makes him sound a little like a game. I would suggest that you get a case with more reality.

Professor Rogow Two other areas should be added which would extend the scope of this concept of justice. The first is the due process within prison, It is a kind of sadistic system, and the question of the prisoner's rights after he goes into the penitentiary should be included. Related, is the question of his rights after he gets out.

Judge Frantz — Due process in detention would be meaningless in our state because we have an excellent prison system.

Professor McCloskey — Our priority is to dissipate this, "He is guilty", anti-psychology, and provide the student with a basis for rejecting that point of view by analogy when he confronts other situations. Arthur Accused would be improved with the use of a real, rather than a hypothetical, case.

Professor Hurst — In any general textual treatment of this, it would be desirable to call attention to the rather provocative questions of procedure in the reaching of general public policy decisions. Particular reference should be made to passing of legislation, with the implications of the fact that no one has any constitutional rights to notice or hearing before a statute is passed which affects him in most vital respects, that he has practically no legally recognized rights before a legislative investigating committee, and that the presumption of constitutionality, once it begins to be really applied, as it has in the last generation, might be said to take away the substantial rights of all interested in the community welfare.

Professor O'Neil — Cases ought to be more than realistic, they need to be real. You can create by hypothesis something which is more realistic than you can find in the newspaper or law reports. Also you may be able to use hypothetical materials to build in certain value conflicts which you just do not find readily. This may be bordering on manipulation, but perhaps it is worth considering. You manipulate in drafting questions for law school examinations to get just the kind of factual setting that you want.

The problem with Arthur Accused is one of presentation which those who fashion the legal issues that are going to be used as teaching vehicles, ought, at this point, delegate to those who are more familiar with the high school classroom.

Professor Starr From a teaching point of view an understanding of justice can be developed by the use of actual court cases involving majority and minority opinions. In such cases teachers and students can explore and analyze the issues, and they can gain an insight into how trained minds arrive at different conclusions concerning the nature and scope of justice. The same technique may be used in illuminating the concepts of liberty and equality.

Dean King Our cases should be the most difficult ones, those in which the people of the community differ. The judges very often differ on highly technical points that do not involve the points of stress that are the great danger and meaning of the Bill of Rights.

Professor Westin The reason why I think the Arthur Accused case is troublesome, is that the public likes bank robbers as all of the reactions to the Brinks job and the British heist tend to show. Once the great principle of insurance made it clear that none of us were going to lose our life savings, Arthur, as long as he did not kill anybody in the process, is going to be something of a hero, especially to the high school student.

Chairman Jones For the purposes of the recommended course, the aspect of justice that would be the central theme is procedural due process. Further, within the "justice equals procedural due process" concept, the administration of the criminal law is the top priority theme for the purpose of instruction.

C. RECOMMENDATIONS FOR ADVANCED SEMINAR

THE ADVANCED SEMINAR

We urge support for Georgetown University Law School which is interested in co-sponsoring a second seminar with the National Assembly. This advanced seminar should be conducted as early as possible and aim at complete agreement on the concepts, priorities and guides for teaching and development of materials.

The Boulder seminar devoted considerable discussion to the task and organization of the Advanced Seminar.* Our report is considered preliminary, and is to serve mainly as a guide to the Georgetown Seminar. The report of the Advanced Seminar should be published for wide distribution to scholars, educators and community leaders and should be of maximum usefulness to an anticipated curriculum and materials development project and to scholars at universities and curriculum specialists within school systems throughout the country interested in further development.

The Boulder Seminar delegated the development of a specific outline of papers and procedure for the advanced seminar to the five members of the National Assembly Board of Directors who were participants there. For the purposes of liaison and development it is fortunate, also, that the Associate Dean of Georgetown Law School was a member of this seminar.

The task of the advanced seminar is to conclude, or come as close to concluding as possible, the development of a widely agreed upon, balanced, conceptual base for effective teaching of the Bill of Rights. Also, specific suggestions and broad guidelines should be enunciated for the development of materials, teaching techniques, teacher education, student education and acceptance of this educational program within communities.

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* Described fully in Research Development Project Proposal submitted to the U. S. Commissioner of Education by Georgetown University for the Advanced Seminar on School Curricula for Instruction in the Bill of Rights, November 30, 1963.

Using the agreements reported here as an approach, advance papers should be commissioned to serve as the basis for discussion at the next conference. They would constitute a broad outline for the three areas of liberty, equality and justice, which would press the conceptual basis further and fill it out with subdivisions. Specifically, they would describe the priority of subject matter so that the advance seminar would have, in outline form, a fairly comprehensive view of the way each field would be developed. They would also specify what kind of historical and social science material should come in and at what point.

Mechanically, the advance papers should be developed by teams of writers assigned to each topic of liberty, equality and justice. The teams should be composed of scholars from the disciplines of law, history, political science, sociology, and/or anthropology and/or psychology. The legal aspects of each topic would provide the skeleton. Each discipline would provide an overlay of data from its own field to support and round out the legal base. Further, as much as possible, fully developed case and historical material should be supplied, and a selection offered of the full range of cases and other data and supplementary reading that should be included to provide the teacher and student with adequate understanding.

We commend the reading of this full r eport including the papers to writers of the papers for the advanced seminar so that they may have a common orientation as to the direction of our probing, our agreements, our clear but unresolved thoughts and our hunches. Further, the original papers and the modifications instructed by the first seminar should be directly tied together and serve as the springboard for the writing of the advance papers.

The writers should be selected both for their high scholarship and for their proximity to other members of the team, so that the papers can be developed through a few consultation meetings.

The papers should be submitted in advance of the second seminar to all of its participants.

The participants should include some members of the Boulder Seminar, the writers of the advanced papers, leading scholars from the relevant disciplines, distinguished practitioners and community and education leaders. Participants should be selected both for their prominence in this work and the fact that their association with it will contribute to its wide acceptance by school communities.

IV. COMMENTS AND SUGGESTIONS

1. COURSES OF STUDY RELATING TO THE BILL OF RIGHTS

Professor Starr (A Brief Outline of Courses of Study Relating to the Bill of Rights)

The courses of study relating to the Bill of Rights occur in a cycle of 5th grade, 8th grade and 11th grade, generally. American history begins in the 5th grade, usually. Then, it is repeated in the 8th grade and again in the 11th grade. Reference is made to the Constitution and the Declaration of Independence. Some of our schools have a 9th grade course entitled civics. There is a tendency today to derogate this course by calling it "ash can civics," the implication being that all the course is concerned with is keeping the streets clean, etc. If there is a renaissance of this course, certainly the Bill of Rights would be applicable here. In the 12th grade now, many schools are beginning to have a "problems of democracy course." This, too, is often referred to derogatorily as a place where you teach dating and how to take care of the baby. In more enlightened communities, one half of this course or one semester is devoted to government. Here the Bill of Rights can be explored in great detail, with the moral as well as the legal implications fully discussed.

Whenever these documents are mentioned, it is inevitable that the word "equal" will be noted, "all men are created equal," equal in their right to life, liberty and pursuit of happiness. At some time the teacher has to explain this. Many teachers do not know as much as they should concerning the history of the 14th amendment, the events that led to it, and the classic cases that clarify the equal protection clause. Some teach the subject poorly; others tend to evade it. There are certain aspects of equality that are taught fairly well, it seems to me. The rights of women are presented pretty well in American history textbooks. Similarly, the subject of religion, from intolerance to tolerance to religious freedom is explained quite clearly in most of our history books. The history of slavery is described well in most of our history books. But what is not explained is a case study in which we follow through on one of these great problems and see how each generation tries to solve the problem and how a failure to resolve it may lead to our present predicament. Equality means equal in the eyes of the law, and it also implies equal opportunity in the political, economic and social spheres. Professor Pollak offers a case study of this. If it were taught properly, a student would see how a minority group gained equal status or is gaining equal status. This bridges the gap between what is and what ought to be, inequality leading to equality through judicial measures, and if the executive, legislative and judicial processes fail there apparently is another route to attain this.

Professor Pollak

If, as Professor Starr suggests, history is taught three times, we should teach the easiest thing in the early grades, namely equality. Religion, which is more difficult, should be saved for the later grades.

Professor O'Neil

Dr. Starr's reference to the three times cycle and Professor Pollak's suggestion of presenting first the easiest area, then the harder one, and finally in the 11th grade the hardest, might or might not coincide with the series of priorities for a cycle or a sequence which might be set up with an eye to the drop-out problem. The area of racial equality might be both the easiest and the one you want to make most sure everybody in the school system gets. Only that which is taught in the 5th grade will surely reach everybody. What is taught in the 8th grade may reach 90-95% of the students. The major areas you treat in the 11th grade will reach 60-65%.

In the practical limitations on classroom situations there are a number of variables which might determine use of the broad or narrow approach. These are such things as where a course of this kind fits into the curriculum, whether it is a part of another course or a separate course. Is it in history, government, or problems of democracy. Then you would need to know how many classroom hours are available, what the materials are, what the skills of the teachers are, what grade level it is to be taught at, and within any grade level whether it is to be a part of the college tract or the slow learner's tract.

Could we particularize the consequences of necessary selections as between some of these variables?

It may mean certain more specific things. One would be how closely related your treatment of the subject of equality would be to other subjects within the Bill of Rights. A citizenship approach to equality runs equality much more directly into other Bill of Rights problems than if you treat it solely in terms of the equal protection clause. A second difference is how much and the kind of background material. Do you use historical studies or the morning newspaper? A third difference is that you might omit certain aspects of the problem of equality for one of two reasons. One, some could not deal with certain aspects of the racial problem. The other is that certain subjects are too difficult for the slow learners, but are perfectly tolerable for the pre-college people. Fourth, has to do with priorities of value. The number of values which can be given are going to be determined by some of these variables.

Dr. Oberholtzer

I know we would be interested in a broad approach, not the legalistic approach. Probably the greatest criticism we have of our work in the schools today by those who are knowledgeable and do not generalize from one or two experiences, is that we skim the surface on too many things and we do not go into depth on a few things. No group or specialist feels that the schools adequately deal with their subject. Our problem with school time limited, is one of priority. What to deal with and how to deal with it in enough depth to give young people some feeling of it, not just repeat in an intellectual, academic way certain answers to questions. This is probably more often the fault than anything else. I hope that out of this conference will come a few concepts or ideas, not a multitude, that would be a beginning point of real exploration and feeling in this area. Now, we have too much of the cursory, surface approach to it. I cannot answer the questions of how much time or how many units on what course.

I would like to add one thing. You are not going to solve very much of it by coming up with these concepts and generalizations. We are going to have to get at the American teacher, the one who utilizes these materials. Every effort of this sort has faced this sooner or later. You can have the finest materials in the world but in the hands of the ignorant or the non-sympathetic they are almost useless. And so you have a dual problem of not only materials but of application to teachers, and this is a long process.

Dean King — I think that the commitment to high school is over-emphasized. I would like to ask Dr. Oberholtzer if in the grades below high school something might be done.

Dr. Oberholtzer — I agree very heartily. This matter of attitude formation as discussed here, indicated that the early grades are highly favorable. In this field you are dealing not just with subject matter but with relationships among people which begins very early in school. It is not unrealized in the elementary schools. The importance of the implications of these concepts to what happens in school needs greater emphasis. It is tremendously important in the beginning and should not wait for more verbal handling in the secondary schools.

Mr. Craig — This may be premature but it is a matter not to lose sight of. The Georgetown Seminar, or some subsequent group, should be thinking about the time in the curriculum available for the teaching of these concepts with the insights and sensitivity discussed here. For the assistance of educators who are going to use whatever comes out, possibly some consideration or recommendation might be submitted in the final report with respect to how long it is going to take to present a course in this area. Will it take a two year course? Is it going to take some kind of a split course? What areas of other subject matter are covered in this general course? Could those courses be shortened and the time given to this area?

Dr. Oberholtzer Mr. Craig has said one of the most important things that we must consider. I would hope that there would be no modesty on the part of the group in taking to heart the value of this whole enterprise in relation to what else you might teach in history or social studies, particularly in light of the time in which we live and the world situation.

Professor Westin A statement assessing where, from the beginning of school curriculum through the 12th grade, you can introduce this material, how much time you have at various stages, and where the most likely places are that we could work, should be available to the Georgetown Seminar. We have talked priorities. We have reached some decisions that if you had time for only two units this is what we might recommend; if you had ten units, this is what we would recommend; if you had a whole year, you would do it quite differently. A lot of the debate here has been in terms of one priority when, in fact, that is not the decision that we have come to in many ways. There are many different alternatives and we do not know what they are completely. I would propose that we get a paper surveying the school curriculum, suggesting what the patterns are, and at which stages we would introduce the material and how much time is available, generally.

Professor Starr This subject has been uppermost in my mind. Our most difficult job will be the implementation of this program. Each school system has its own sense of values as to what is important. Such a paper is absolutely essential. I do not know that any one person could write it. Possibly it has to be a team because there are so many complex factors to be studied and analyzed.

Dr. Oberholtzer In order to meet Professor Starr's point of finding a vehicle or way of entering the schools, you will have to relate that conceptual framework of the Bill of Rights, liberty, equality, and justice to the important problems that confront each of us today in our daily lives.

A point of emphasis here has been the inter-relationships and the conflicts of these concepts which we feel and look at every day in our communities. We need to get into the minds of our students and citizenry some of the terrible diversity and complexity of the situations with which we are dealing. Somehow, to get the work into the schools we need not only this wonderful conceptual base but a translation of it into language most of us will understand.

I think the time has come for a group of this sort and for a national effort to make a dent.

Professor Rogow If I understand Dr. Oberholtzer correctly, he is saying, no matter how good this is, there is going to be trouble getting into the schools. What sort of vehicle do we need?

Dr. Oberholtzer No matter how good any kind of material is, there is always the problem of getting into the schools because of the diversity of our school system. There is a readier acceptance now for materials that are good and understandable, particularly from national groups or bodies of reputable scholarship and research. As a matter of implementation, I would suggest very close and continuous

association with some of our professional educational groups. Find a way to involve them before your work is completed. Invite them to your Georgetown Seminar.

2. TEACHING METHOD AND ORGANIZATION

Professor Starr Teachers need pegs upon which to hang clusters of ideas.. The First Amendment freedoms illumine a concept of liberty. Amendments Four through Eight relate to the concepts of justice. Professor Westin's categories could be subsumed under the First Amendment liberty or the justice concept amendments. This may present us an avenue of approach.

Judge Hastie This suggestion of Professor Starr's is the best way to present material to students. Is it proposed that this functional presentation should be substituted for a type of organization which builds around separate concepts of liberty, justice and equality, and relates these concepts to specific parts of the Bill of Rights?

Professor Dorsey It would be for the purpose of presentation to students, but it would make the specific concepts of the amendments contributory to the main organizing concepts of liberty, equality and justice, so that students can understand the conflict of interests in terms of our current position about equality, justice, liberty. Students should see that both sides of the issue stand for "true equality," "true liberty," "true justice."

The historical presentation would say this is as far as we have come. Here is the issue. It came up in this way. These were the decisions that were made with respect to it, until it was more or less solved. That is what liberty means with respect to that problem; that is what justice means with respect to that problem; that is what equality means with respect to that problem. Now here is a current problem. It is not solved yet. Here are the interest groups. One says liberty means this; the other says, no, liberty means that, because of their situation. Here is the interest they are trying to protect, to preserve and maintain. From this standpoint they argue for this meaning of liberty or equality and justice. It is from that other standpoint that these other people say, no, it means this and there is the issue that is going to be resolved by the court. Now, it has not completely come up yet because the case arose in this way and it is only at this point. This problem is still with us and not socially resolved yet. It will ultimately be resolved through this social process of adjusting to official rational judgment which we all have the obligation to accept and live by.

Judge Weigel

Our problem here is the difference between what and how. What the principles of the Bill of Rights are is stated by that document; the entry therefore must be legal. What the meaning of the Bill of Rights is is declared by the Supreme Court; therefore the principles of the rights must be a combination of understanding the language of the Constitution and what the courts have said it means. The disagreement comes on the question of how, how do you teach it. There are some among us who feel that in terms of equality the best way of teaching it is to use the development of the law in regard to racial equality. On the question of how, there are others who think it is a matter of balancing case studies. Others feel how to do it is to get to the level of the students you are teaching, which I completely agree with. No one methodology is exclusively the best methodology and all ought to be explored.

Professor O'Neil

Perhaps there are three distinct approaches to organizing materials and teaching. One is close to the "thread of liberty" approach in the Williamstown Workshop Report. This includes a thread of materials for each period in a continuous flow of history from start to finish, from 1789 to the present. Another quite distinct approach is Professor Westin's episodic approach which pinpoints certain crises in freedom, alien and sedition acts, the gag resolutions, the slavery debate and so forth, and picks out six or eight or ten, depending on time for teaching, specific time slots to which attention would be devoted. The problem is one of making certain jumps from each of these episodes across certain watersheds in the American Constitutional history and still explaining, for example, about the Civil War amendments in the slaughter house cases, or what happened in 1937, if you deal first with the problems of freedom in the '20's and then you get to the '40's. You have to explain, or ought to explain, something about incorporation and absorption of the Bill of Rights and what this means for the states, if you have an episode of one on either side.

A third approach might be called a contemporary approach. This would recognize that in many areas the judicial history of the development of freedom is a very current thing. This history of the establishment of religion, for example, really begins in 1947 with the Everson case. Obscenity, if you can teach it at all, certainly begins after the First World War. Even racial problems, the first case dealing with education, come from the late '30's. Most of our free speech law comes from after 1930. It might be possible to tailor a whole course around an essentially contemporary approach of the last twenty-five years, using the earlier history only through occasional flashbacks, but with the emphasis upon the recent judicial development. This recognizes that the history of the 19th century affecting the liberties of the Bill of Rights is one of political action rather than judicial and that in most of these areas the judicial response was delayed a hundred years or more from the initial political confrontation with the liberties of the Bill of Rights.

Unanimous Motion

We commend Professor Dorsey's material* which presents one specific approach of rights in conflict as offering a very useful lead into the problem of preparing conceptual studies for the Advanced Seminar.

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* See page 55.

3. DEVELOPMENT OF CASE STUDIES AND OTHER MATERIALS

1. The right kind of case cannot be one or even three pages. It must be rich in background material and explanation of the institutional framework within which decision is made. A case has to be complex and rich enough so that a class having read it has an adequate level of information and a common emotional context. The school does not need the older format of the law school which is a set of opinions as an illustrative variant. (Professor Westin)

2. There are two possibilities for developing cases for consideration at the Advanced Seminar: the first would be an outline approach which says, for example, in order to teach this we should have a case that does this, a case that does that and a case that does something else. The second would be a complete development in 15 to 20 pages of a single case, through which one would teach specific concepts. Here, the Advanced Seminar could consider how good it is for this purpose, for what kind of student, at what grade level, in which course to start the consideration with comments to pass on to the next group for pinning down further. (Professor Westin)

3. On review I am concerned that we may not have taken a lead out of our own book in what we offer as a guide for the next seminar. We have all agreed that the case method is the guts of what we are recommending, but we have adopted a group of broad generalizations in our respective consensuses. I am very much concerned that with the verbal formulas we have drafted, our successors can miss the point altogether. Maybe we have not said what we mean in our consensus by being sufficiently concrete. We need to illustrate what we mean. We have talked about the case method and then in our equality discussion talked about the history of racial equality as though this were an illustration of the case method. It is not. It is the selection of an area, selection of a priority. We even veered away from getting that concrete in the draft of the consensuses statements where we selected a larger area to describe as our priority. Here we could illustrate that by the case method we mean a problem out of the life of some citizen or subject of the laws of the United States and our manner of dealing

with it could illustrate how it can be used. I suggest that the topics for classroom discussion following the statement of facts might best be stated as questions. Part of our premise is that we are not giving the answers. There are some concrete legal answers to some of these questions, but our concern is not that the student know all the right answers to the way the courts have determined the Bill of Rights should apply. He certainly need not know all the statutory provisions and judicial decisions that go beyond the minimum of the Bill of Rights. He should understand, however, why some of these questions will be answered one way and what are the pressures which suggest an opposite answer. (Mr. Pemberton)

4. Case studies must be so concrete, so realistic, so close to home that they will serve to stimulate the interest of students in what they do not realize at that point but later come to realize are essentially legal issues. (Professor O'Neil)

5. After each case list about twenty questions that the teacher might ask his students. Also, tie in supplementary materials useful to the teacher by suggesting pages in particular books, any other supplemental material which give the teacher keys where to go to find the answers or get prepared with an answer before he asks these of his class. (Professor Dorsey)

6. The final development of case and other materials for use in the classroom should be accomplished in consultation with those experienced in teaching at the grade level for which the material is intended. (Professor O'Neil)

7. The discussion at this seminar about economic liberty already indicates that the development of illustrative material on property rights, the freedoms and the complexities therein, would be immediately valuable in order to focus on specifics which can then be accepted, rejected or modified, by this group, the next seminar participants or whoever carries this project forward. (Professor Cross)

8. We commend to the next seminar and further projects, the encouragement, by The National Assembly, of several publications which will fill out this field for teacher and student beyond text and classroom material.

9. Much case and other material which has been written for college students could, with the collaboration of experienced teachers at elementary and secondary levels, be readily adapted. The job then would be to discover how it can be made useful for this new purpose and with field testing, actually revised so that it is useful. (Professor Pritchett)

10. One such publication which is already indicated is an inexpensive little book, which presents in a broad and comprehensive way material that a group of competent people may think is relevant to appraising Bill of Rights problems. It could be the product of several authors, and should have expert editorship to assure that it communicates well.

It should include some matter from common law, from statute and from the Constitution in general. It would be desirable for both teachers and students to see the theme of liberty primarily in terms of the Bill of Rights in the conventionally more narrow sense of the term. It would be desirable to present the ideas of liberty in a broader frame of reference so that it is realized to what extent the values here pervade very wide aspects of the society. I think this may be desirable partly because the Bill of Rights, even after a good deal of education on it, is going to sound rather way-out stuff to a lot of students and a lot of teachers. It is a matter that deals with exceptional situations. I think there is some value in talking even about such a mundane matter as the liberty significance of the availability of a discharge in bankruptcy or the liberty significance of laws in collective bargaining or the liberty significance of laws dealing with the internal procedures of private associations, just in order to bring closer home the notion that values at stake here are, in fact, very widely pervasive in the life of the society. And this it seems to me can be done through the little book. (Professor Hurst)

11. In translating Professor Hurst's excellent analytical comments to teaching materials one of the important goals would be to demonstrate the different positive, thoughtful, intervening kinds of structural action that may be required by society and by government in order to make liberty meaningful. Freedom of speech is not simply a matter of releasing people from governmental restraints. It may be such a positive governmental step as making a Hyde Park, England, possible where freedom of speech can be exercised. (Professor Pritchett)

4. UNANSWERED QUESTIONS

1. Is there value to developing another series of papers directed at the three different audiences of scholars, teachers and school students?

2. What specific guide can be offered to the teacher or professor of the college level course on Constitutional liberty or civil liberties?

3. How far are we going into questions like the allocation of economic resources between the public sector and the private sector?

4. In the field of liberty we developed only the first priority of freedom of expression. Are there other areas of "Liberty" which need to be discussed further and evaluated for teaching in greater depth?

5. In the field of justice, a number of suggestions were made for additional avenues for developing the procedural due process concept, such as comparison with the Soviet Union and England. These require further evaluation and, if indicated, incorporation.

6. Do schools now generally educate for citizenship within the social studies curriculum on a level of sophistication that is approved by leading scholars? What is "citizenship education" these days and how does the Bill of Rights fit into it?

7. In terms of deepening student understanding how can we relate the teaching of the "isms," which is now in vogue in our schools, to the teaching of the Bill of Rights and our concepts of liberty, equality and justice?

8. Should these seminars recommend the amount of time, in which course and from where the time should be taken in order to achieve an adequate standard?

9. Could we spell out the consequences of what a student would come to understand from alternate approaches to education on the Bill of Rights? Is it possible to evaluate these alternate approaches in terms of society's interest in maintaining and developing freedom through its formal institutions? Could alternate schemes be posed which pin down the variables of time, technique and materials and point to likely results? These would say, in effect, 'Scheme I' takes the concepts of liberty, equality and justice with only the first priority in each, uses this much historical background, this much supporting data from other disciplines, this much legal emphasis, these cases, this supplementary reading, etc., within the 5th grade, 8th grade and the 11th grade U.S. history course, for which "X" number of class hours and "Y" to "Z" number of hours for supplementary reading and assignments at each grade is required so that by completion of high school a slow student and/or a drop-out would understand this; an average student would understand in this depth; and the bright student would be able to understand this much. 'Scheme II' with more priorities within each concept and more of all variables would achieve a larger amount. 'Scheme III' would bring about this much understanding in this way. Could we then say that we have an improvement over what is now being offered? Is it adequate, given the interest of society at this time? The answers may permit a shift in the variables of time, course, teacher education, materials, etc., if one is required so that the interest of society will be met.

10. How are we going to reach the current teacher and prepare the future teacher?